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No. ____
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In the Supreme Court of the United States

October Term, 1996

OFFICE OF THE PRESIDENT,
Petitioner,

v.

OFFICE OF INDEPENDENT COUNSEL, ET AL.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case, the Office of Independent Counsel has issued a grand jury subpoena commanding the White House to produce notes of certain communications between attorneys in the Office of the President and the First Lady, Hillary Rodham Clinton, in the presence of the First Lady's personal counsel. The court of appeals, which enforced the subpoena by a divided vote, did not dispute that the notes (i) reflected confidential communications (ii) made for the purpose of providing legal advice (iii) to a client (the Office of the President) (iv) in connection with ongoing grand jury proceedings and contentious legislative hearings. The court held, however, that there simply is no governmental attorney-client privilege in the face of a federal grand jury subpoena. It also held that documents created by government lawyers in anticipation of grand jury and legislative proceedings are not prepared "in anticipation of litigation" for purposes of the work product doctrine.

The petition presents two questions:

1. Whether the court of appeals correctly held that the Office of the President does not possess an attorney-client privilege that may be asserted in response to a federal grand jury subpoena and must comply with the subpoena.

2. Whether work performed by attorneys for an entity of the federal government in anticipation of grand jury proceedings involving the entity and employees of the entity, or in preparation for legislative hearings investigating the operations of the entity, is protected under the attorney work product doctrine.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, Hillary Rodham Clinton was a party in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

The Office of the President respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-61a) is not yet reported. The opinion of the district court (App. 62a-83a) is unreported.

JURISDICTION

The court of appeals entered its judgment on April 9, 1997. The petition for a writ of certiorari is accordingly due no later than July 8, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULE INVOLVED

The text of Rule 501 of the Federal Rules of Evidence is set forth at App. 96a.

STATEMENT

This case arises from a subpoena *duces tecum* issued to the White House by the Office of Independent Counsel Kenneth W. Starr ("IC"), calling for production of "*[a]ll* documents created during *any* meeting attended by *any* attorney from the Office of the Counsel to the President and Hillary Rodham Clinton" (emphasis added) regarding a wide range of subjects. App. 2a. Although the IC and the White House had successfully resolved many other disputes over requests for information, the IC chose, through this subpoena, to contest whether the federal government is entitled to the protections for its lawyers' activities enjoyed by all other organizations. Because the IC has determined not to recognize the confidentiality of *any* communications between attorneys for the federal government and any government officials, petitioner has sought judicial resolution of the matter.

Reversing the district court's decision, a divided court of appeals ordered the subpoena enforced. The majority recognized that the lower courts have applied a governmental attorney-client privilege in a wide array of settings, thereby "encouraging the full and frank presentation of legal advice" to government clients. App. 16a. Notwithstanding this well-settled body of law, the majority treated the present case as one of "first impression" (*id.* at 29a) because it arose in the context of a federal grand jury investigation. In that setting, the majority stated (*id.* at 17a), "the general duty of public service calls upon federal employees and agencies to favor disclosure over concealment." The court of appeals also held that petitioner could not invoke the work product doctrine because the White House could not itself be indicted, and therefore the subpoenaed materials were not prepared "in anticipation of litigation."

A. Factual Background

1. In January 1994, Attorney General Janet Reno appointed Robert Fiske to investigate "whether any individuals or entities have committed a violation of any federal criminal or civil law relating in any way to President William Jefferson Clinton's or Mrs. Hillary Rodham Clinton's relationships with: (1) Madison Guaranty Savings & Loan Association; (2) Whitewater Development Corporation; or (3) Capital Management Services." 28 C.F.R. § 603.1. Mr. Fiske was replaced by Independent Counsel Kenneth W. Starr in August 1994, after the Independent Counsel statute was reauthorized.

Although the IC's investigation initially focused on events in Arkansas that antedated President Clinton's Administration, it has expanded to encompass a wide range of allegations regarding the conduct of White House officials during this Administration. In connection with these matters, scores of present and former White House employees have been interviewed by the IC or have given grand jury

testimony about their conduct during this Administration. The IC has issued more than 20 document subpoenas to the White House. Moreover, all of these matters also have been thoroughly investigated by congressional committees, which have treated them as affairs having serious import for the Office of the President. See Declaration of Jane C. Sherburne ¶¶ 6, 12 [hereafter "Sherburne Dec."] (App. 85a).

This swirl of inquiries has produced a host of legal issues for the Office of the President requiring the involvement and advice of White House attorneys. The task of these lawyers in rendering legal advice to the Office of the President has included, among other things, satisfying the Office's obligation to respond to document requests and subpoenas from Congress and the IC; considering whether to recommend that the President invoke executive or other privileges with regard to any of the information requested; advising on matters related to appearances by White House officials before congressional investigative committees, and negotiating the terms of such appearances; representing the Office of the President in connection with interviews and depositions by the IC of White House personnel, including attendance at depositions of the President and the First Lady, discussions with the IC regarding such interviews and depositions, and advice to the President, First Lady, and White House staff in connection with these interviews and depositions; advising whether the Office of the President should alter its policies in response to information developed by investigations of any of the above matters; seeking to ensure that the conduct of White House officials is presented accurately and portrayed without distortion in congressional hearings; ensuring that public statements regarding the matters under investigation are accurate; consulting with personal counsel for the President and the First Lady and personal counsel for White House staff on factual and legal points of mutual concern; and, in the latter connection, evaluating where the line is properly drawn between the President's and First Lady's

official and personal capacities and which functions are properly performed by White House counsel, which by personal counsel, and which by the two together. See Sherburne Dec. ¶¶ 7, 9 (App. 85a-87a); Affidavit of David E. Kendall ¶ 3 (App. 93a).

2. At issue in this litigation are lawyers' notes generated during two meetings among Mrs. Clinton, attorneys representing her in her personal capacity, and White House lawyers representing the Office of the President with regard to the concurrent IC and congressional investigations of Whitewater and related matters. The first meeting took place on July 11, 1995, and was attended by Mrs. Clinton, Special Counsel to the President Jane Sherburne, Associate Counsel to the President Miriam Nemetz, and David Kendall, a partner in the law firm of Williams & Connolly. Ms. Sherburne was the lawyer in the Office of the President with responsibility for providing advice to the White House in connection with Whitewater-related issues. Ms. Nemetz worked with Ms. Sherburne on these matters. Mr. Kendall represents Mrs. Clinton in her personal capacity in connection with the investigations of Whitewater and related matters. Ms. Nemetz took notes during the meeting (the "Nemetz notes"). Sherburne Dec. ¶¶ 11, 16 (App. 87a, 89a).

The July 11, 1995 meeting and related notes concerned Mrs. Clinton's activities in the period immediately following the death of Deputy Counsel Vincent Foster. Eleven days later, on July 22, 1995, the IC interviewed the First Lady extensively about this matter. In addition, the Senate Special Committee to Investigate Whitewater Development Corporation and Related Matters (the "Senate Whitewater Committee") began public hearings on the Foster matter on July 18, 1995. Ms. Sherburne and Ms. Nemetz were involved in gathering and analyzing the facts relating to this matter so that they could advise the Office of the President regarding the related grand jury and congressional investigations. Sherburne Dec. ¶¶ 14-17 (App. 88a-89a).

The second set of notes at issue was taken by Ms. Sherburne (the "Sherburne notes") during breaks in, and immediately following, Mrs. Clinton's appearance on January 26, 1996, before a federal grand jury in the District of Columbia working under the direction of the IC. Present were Mrs. Clinton, Ms. Sherburne, Mr. Kendall and his partner Nicole Seligman, and at times John Quinn, Counsel to the President. The meeting was a traditional "debriefing" of a witness regarding her grand jury testimony; that testimony principally concerned the January 1996 discovery of a copy of Rose Law Firm billing records in the White House Residence. This discovery had dominated the news for several weeks, and the Senate Whitewater Committee had initiated an investigation of the matter. Sherburne Dec. ¶¶ 18-21 (App. 89a-90a).

On June 21, 1996, nearly two years after taking over the Whitewater investigation from Mr. Fiske, Independent Counsel Starr issued to the White House a subpoena *duces tecum* calling for production of "*[a]ll* documents created during *any* meeting attended by *any* attorney from the Office of the Counsel to the President and Hillary Rodham Clinton" (emphasis added) regarding a wide range of subjects. App. 2a. The White House identified nine sets of notes in response to the subpoena, including the Nemetz notes and the Sherburne notes, but declined to produce them, stating that they were subject to claims of attorney-client and executive privilege and were also protected by the work product doctrine. See Letters from Jane C. Sherburne to John D. Bates (reprinted at IC App. 8-11).[1]

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[1] References to "IC App." and "White House App." denote the respective appendices filed in the court of appeals.

B. Proceedings Below

1. On August 19, 1996, the IC moved to compel production of the Nemetz notes and the Sherburne notes.[2] Following briefing and oral argument, the United States District Court for the Eastern District of Arkansas (Wright, J.) denied the motion to compel. App. 62a-83a. The court observed (*id.* at 73a-74a) that "it is generally accepted that the attorney-client privilege applies in the governmental context in civil cases," and it could discern no authority suggesting why the privilege should not likewise apply in the grand jury context (*id.* at 72a-73a). Moreover, the court recognized (*id.* at 74a) that there was a need in this case for both personal and governmental counsel to communicate with Mrs. Clinton: "Many of the factual and legal issues span the date of Inauguration and thus require the services of both personal and official lawyers."

The district court nevertheless declined to reach the question whether an entity of the federal government may generally assert an attorney-client privilege in response to a grand jury subpoena. Taking a narrower approach, the court held (App. 82a) that "these notes are protected from disclosure by the reasonable belief of the White House and Mrs. Clinton that the communications were privileged * * *." "Even prior to the meetings at issue here, the White House Counsel's Office has generally considered confidential communications by its lawyers for the purpose of legal advice to be shielded by the attorney-client privilege." *Id.* at 73a. Because there was "no dispute that Mrs. Clinton, her personal counsel, and the White House lawyers all considered these meetings to involve confidential attorney-client

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[2] The IC did not pursue the other documents identified by the White House, which were notes and memoranda memorializing the IC's sworn depositions of the First Lady, which both White House lawyers and the First Lady's personal counsel attended.

communications" (*id.* at 76a), the court sustained the assertion of privilege.

As a second and independent ground for denying the motion to compel, the district court held (App. 81a) that the subpoenaed notes are also "work product of the type that is clearly protected from disclosure to the grand jury." The notes were prepared by counsel and plainly "reveal the attorneys' mental processes in evaluating the communications." *Ibid.* In addition, the court found (*id.* at 64a) that the notes were created in anticipation of litigation, because "at the time of the meetings at issue in this case, there was a considerable amount of legal activity taking place with respect to Whitewater related matters." The court accordingly held (*id.* at 81a) that "[t]he Nemetz and Sherburne notes are * * * work product" and, under Eighth Circuit precedent, were "absolutely protected from disclosure in [the] grand jury setting."

2. The court of appeals reversed by a divided vote. App. 1a-61a. The majority recognized that "the attorney-client privilege is the oldest known to the common law" (*id.* at 6a), and that the courts, commentators, and this Court's Proposed Federal Rule of Evidence 503 have "ma[de] it clear that '[t]he definition of "client" includes governmental bodies'" (*ibid.*). The majority concluded, however, that these authorities do not resolve "the particular situation before us in this case" (*ibid.*) because they did not involve an assertion of attorney-client privilege in the context of a federal grand jury investigation (*id.* at 5a).

The majority therefore approached the issue as if it were called upon "to establish[] a new privilege, which courts ordinarily undertake with great reluctance." App. 6a. Beginning with that premise, the majority concluded that a claim of attorney-client privilege simply could not be countenanced in this setting. It acknowledged that *Upjohn Co.* v. *United States*, 449 U.S. 383 (1981), "contains strong

language about the importance of the attorney-client privilege in encouraging the full and frank presentation of legal advice." App. 16a. It decided, however, that there were more important lessons to be learned from *United States* v. *Nixon*, 418 U.S. 683 (1974). Although "the President did not assert an attorney-client privilege in *Nixon*, and so the case is not directly controlling," the majority nevertheless surmised (App. 15a) that "*Nixon* is indicative of the general principle that the need for confidentiality within the executive branch may be subordinated to the needs of the federal government's own criminal justice processes." "[M]ore importantly," the majority added, permitting the assertion of a governmental attorney-client privilege in this context would contravene what the majority termed "the general duty of public service," which "calls upon federal employees and agencies to favor disclosure over concealment." *Id.* at 17a.[3]

In addition, the majority held (App. 25a-27a) that the subpoenaed materials do not constitute protected work product because they were not prepared in anticipation of litigation. It observed (*id.* at 26a) that the IC has been investigating only White House *officials*, not the Office of the President, and that the government could not assert a work product claim merely because "some other person was anticipating litigation." *Ibid.* And although the majority recognized (*ibid.*) that the White House itself was anticipating adversarial congressional hearings at the time the subpoenaed notes were prepared, it held that such hearings did not constitute litigation for purposes of the work product doctrine.

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[3] Having determined that there is no governmental attorney-client privilege as against a federal grand jury, the majority held (App. 21a) that there accordingly could not be a "common interest" protection for communications made in the presence of both government attorneys and private counsel.

Judge Kopf dissented (App. 29a-61a), flatly rejecting (*id.* at 31a) the majority's refusal to accept "the well-recognized principle that the government, including the White House, is legitimately entitled to the attorney-client privilege (and the work-product doctrine)." In Judge Kopf's view (*id.* at 48a), "the White House had a legitimate institutional need for the advice of its lawyers so that, acting through people, including the First Lady, as it must, the White House could carefully and candidly respond to the Independent Counsel." And it "misses the point" of *Upjohn*, Judge Kopf added, simply to tell White House officials to talk to private counsel instead of government attorneys. *Id.* at 42a.

Concluding that petitioner enjoys an attorney-client privilege in this setting, the dissent next stated that under *United States* v. *Nixon* a court should apply a "balancing" test that weighs the interests of confidentiality secured by the privilege against the IC's need for the subpoenaed materials. App. 50a. In this case, however, Judge Kopf found it unnecessary to do so in light of the First Lady's *personal* privilege. *Id.* at 56a-57a.

REASONS FOR GRANTING THE PETITION

The Eighth Circuit has issued an extraordinary and unprecedented decision that will substantially impair the ability of the Office of the President (and other federal agencies) to secure sound legal advice, particularly in the face of Independent Counsel investigations. Based on its premise that federal agencies must "favor disclosure over concealment" (App. 17a), the majority concluded that federal government entities may not assert a privilege to prevent the disclosure of confidential attorney-client communications (at least in the context of a federal grand jury subpoena) or assert work-product protection for legal work performed in preparation for legislative hearings or in connection with grand jury investigations of agency officials.

If the court of appeals were right, it would be markedly more difficult for government officials to obtain the candid and informed legal assistance necessary to the performance of their functions. Moreover, the logic of the panel's decision suggests that the Eighth Circuit would not honor the governmental attorney-client privilege in *any* context. Because the court's decision has such grave consequences for the government – and because it is so plainly wrong – further review is warranted.

I. THE DECISION BELOW MISAPPREHENDS THE BASIC PRINCIPLES OF ATTORNEY-CLIENT PRIVILEGE AND MISCONCEIVES THE ROLE OF GOVERNMENT LAWYERS

This Court held in *Upjohn Co.* v. *United States*, 449 U.S. 383 (1981), that private entities such as a corporation enjoy an absolute privilege against the disclosure of confidential communications between their attorneys and persons whose relationship to the entity affords them information vital to the provision of legal advice to the entity. The privilege must be expansively construed and absolutely protected, the Court ruled, "in order that [the entity] could obtain legal advice." *Id.* at 394. Were the law otherwise, the privilege would become uncertain – and "[a]n uncertain privilege * * * is little better than no privilege at all." *Id.* at 393.

In asserting the attorney-client privilege in response to the IC's subpoena, the Office of the President sought only that protection accorded to non-governmental entities under *Upjohn*. Lawyers for the Office of the President communicated with the First Lady in confidence for the purpose of providing legal advice to their client. As the district judge expressly found, there was a surpassing need for *both* governmental *and* personal counsel to communicate with Mrs. Clinton: "Many of the factual and legal issues span the date of Inauguration and thus require the services of both personal and official lawyers. App. 74a. White House

attorneys – no less than attorneys for private entities – have a duty to their client to "ascertain[] the factual background and sift[] through the facts with an eye to the legally relevant." *Upjohn*, 449 U.S. at 390-391. And for that reason, White House attorneys – no less than attorneys for private entities – must be free to communicate, in confidence, with officials, employees, and other individuals within that entity who may possess information that bears on the formulation of sound legal advice. That is exactly what White House attorneys were doing on July 11, 1995 and January 26, 1996, when they met, in confidence, with Mrs. Clinton and her personal attorneys.

Significantly, the Eighth Circuit did not dispute that the notes at issue here would be covered by the attorney-client privilege if taken by an attorney for a private organization, rather than by an attorney for the government. Instead, it held that "an entity of the federal government" may not "use the attorney-client privilege to avoid complying with a subpoena by a federal grand jury." App. 5a. This holding is indefensible from the standpoint of either precedent or public policy.

A. The Decision Below Substantially Impairs The Ability Of Federal Governmental Entities To Consult With Their Attorneys

1. Government agencies, no less than private clients, must have the benefit of sound legal advice in order to conduct their day-to-day affairs. "In the modern regulatory state, where agency decision-making is dominated by statutes and court rulings, lawyers play an extraordinarily powerful role." Herz, *The Attorney Particular: Governmental Role of the Agency General Counsel*, in GOVERNMENT LAWYERS 143, 157 (1995). Because "[e]ven public legal rights are contingent at their boundaries and subject to argumentation and dispute as to their precise extent" (Restatement of the Law (Third) Governing Lawyers, Proposed Final Draft No.

1 (Mar. 29, 1996) § 124 (hereafter "Restatement")), government agencies must have access to legal advice simply to know what the law is and what they must do to comply. Agencies likewise need the benefit of counsel "to resist claims and contentions that the agency considers legally or factually unwarranted." Restatement § 124. And, of course, government employees must be free to consult confidentially with government lawyers concerning the whole array of complex laws and regulations that govern public service – *e.g.*, conflicts of interest, ethics, or Hatch Act restrictions.

In discharging these obligations to their clients, government attorneys, like their private counterparts, must be able to speak in confidence with agency employees and officials. To paraphrase *Upjohn* (449 U.S. at 391), government employees "can, by actions within the scope of their employment, embroil the [agency] in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by [government] counsel if he is adequately to advise the client with respect to such actual or potential difficulties."

Absent a reliable expectation of confidentiality, however, government attorneys "will not be fully informed by the client" and will thus be impaired in assisting their client agency "'to obtain the full advantage of our legal system.'" *Upjohn*, 449 U.S. at 389, 391. Similarly, government attorneys, if they are to be truly candid with their clients, must be assured as well that their advice will be treated as confidential. Not surprisingly, therefore, "the generally prevailing rule" is that "governmental agencies and agents enjoy the same privilege as non-governmental counterparts." Restatement § 124.

That was certainly the assumption of Congress when it enacted Exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(5). See *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 154 (1975). And it has been the firm position

taken by every Administration over the last 20 years, Democratic and Republican alike. As the Office of Legal Counsel summarized the point in a 1982 opinion: "Although the attorney-client privilege traditionally has been recognized in the context of private attorney-client relationships, the privilege also functions to protect communications between government attorneys and client agencies or departments, as evidenced by its inclusion in the FOIA, much as it operates to protect attorney-client communications in the private sector." *Memorandum for the Attorney General re: Confidentiality of the Attorney General's Communications in Counseling the President*, 6 Op. O.L.C. 481, 495 (1982).[4]

2. The court of appeals recognized (App. 19a) that, by crafting a special exemption for federal grand jury proceedings, its decision would undermine the assurance of confidentiality in communications between government agencies and their lawyers. Nevertheless, the majority optimistically predicted that the decision would "not make the duties of attorneys who work in-house for the federal government *significantly* more difficult." *Ibid.* (emphasis added). This optimism is entirely unfounded.

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[4] See also *Memorandum for the Deputy Assistant Attorney General re: The Attorney-Client Relationship in Department of Justice Representation of Individual Employees and Release of Information Obtained During That Representation Under the Freedom of Information Act* (Aug. 30, 1978) (reprinted at White House App. 80a-96a); *Memorandum for the Deputy Attorney General re: Disclosure of Confidential Information Received by U.S. Attorney in the Course of Representing a Federal Employee* (Nov. 30, 1976) (reprinted at White House App. 60a-79a). Indeed, in the 1976 OLC Opinion, Assistant Attorney General (now Justice) Scalia expressly rejected (*id.* at 70a-71a) the proposition that the government attorney's duty to maintain the confidences of a client should be subject to a "balancing approach" that takes account of the competing "public interest in investigating and disciplining or prosecuting wrongdoers."

The majority first observed (App. 19a) that the White House "assumes that the attorney-client privilege is more predictable ex ante than it actually is." But the court's examples – disputes with counsel, the declaration of bankruptcy, and the raising of an advice-of-counsel defense – are all instances in which the privilege is vitiated by events *under the client's control.* A government agency can, of course, also choose to waive its privilege, but it is quite a different matter to say that the privilege is automatically wiped out when an Independent Counsel chooses to issue a grand jury subpoena.

The majority surmised, however, that "confidentiality will suffer only in those situations that a grand jury might later see fit to investigate." App. 19a. To begin with, that assumption overlooks the many cases (like this one) in which a grand jury *has already been convened.* In that event, the grand jury can be expected to "see fit" to investigate – and subpoena – any and every governmental attorney-client communication that bears even slightly on the underlying inquiry. Each day's new attorney-client communications about the investigation itself, or about the subject matter of the investigation, would be fair game.

Moreover, even in matters where grand jury interest has not yet emerged, it remains impossible for a client to know in advance when that might occur. Any conversation, no matter how innocuous, might later be the subject of grand jury inquiry. A grand jury, after all, "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642-643 (1950). Experience shows that this is especially true of grand juries convened by Independent Counsels. As a recent alumna of IC Starr's office has noted, "the Special Division has provided ICs with very broadly worded jurisdictional mandates, and the courts have been willing to accept a very permissive reading of what 'related' matters ICs may legitimately pursue within those

mandates." O'Sullivan, *The Independent Counsel Statute: Bad Law, Bad Policy*, 33 Am. Crim. L. Rev. 463, 485-486 (1996). "Make no mistake about it," one former Independent Counsel has observed, "when you set an independent counsel in motion * * * no train is going to stop that independent counsel until he or she has thoroughly, and I underscore thoroughly, investigated the allegations which have been presented to them by the court." Statement of Joseph E. DiGenova, *Hearing before the Subcommittee on Crime of the Committee on the Judiciary of the House of Representatives*, 104th Cong., 2d Sess. 65, 67 (1996).

It is therefore cold comfort to tell federal agencies and employees that their confidential communications with counsel will be compromised "only" in those situations "that a grand jury might later see fit to investigate" (App. 19a). Under the court of appeals' ruling, attorney-client communications are just another investigative tool, and there is nothing other than the IC's own tactical judgment to prevent him from seeking access to the entire universe of attorney work product. Indeed, although privilege issues tend to be debated in the more antiseptic context of document production, it is important to recognize that, if the court below is correct, *every* IC would be free to turn *every* White House (or other government) lawyer into a witness. Nor, of course, is the problem confined to this investigation. Every other Independent Counsel, now and in the future, is virtually certain to make similar demands. Since 1978 there have been 17 Independent Counsel investigations, at least four of which remain open today. See Congressional Research Service, *Independent Counsel Provisions: An Overview of the Operation of the Law* (Apr. 2, 1997).

Finally, the court below suggested (App. 19a) that "[a]n official who fears he or she may have violated the criminal law and wishes to speak with an attorney in confidence should speak with a private attorney, not a government attorney." But far from illuminating the answer, this

denigration of the role of government lawyers and the responsibilities of government clients merely restates the problem. The issue here is not whether the small number of government employees who fear they may have violated the law should retain private counsel. The court of appeals' ruling will discourage *all* government employees from speaking with government counsel when there is any chance that their statements, however innocuous, could pique the curiosity of a grand jury that is, or may be, investigating their activities. By encouraging government employees to speak only with private counsel, the majority both imposes an extraordinary burden on the employees and effectively deprives the government of critical information.

3. The court of appeals' decision would be damaging enough if all it did was to vitiate governmental attorney-client privilege in the context of federal grand jury proceedings. In fact, however, the ruling casts serious doubt on whether the Eighth Circuit would recognize a governmental attorney-client privilege in *any* setting, because nearly all of the reasons marshaled by the majority carry equivalent force outside the grand jury context.

That is certainly true of the majority's central rationale: that there is a "general duty of public service" that requires agencies and their attorneys "to favor disclosure over concealment." If that is so, why would it uniquely cover federal grand jury proceedings? Surely criminal defendants have equally strong claims to such materials. They, after all, have a constitutional right to compulsory process (the IC does not); thus, the agencies' "general duty * * * to favor disclosure" should require them to disclose otherwise privileged materials to indicted individuals as well. And what reasoned basis, given the premises of the decision below, exists for stopping there? Private plaintiffs in litigation with the federal government often seek to vindicate "the public interest" (App. 18a). The Eighth Circuit's newly-minted duty

of disclosure seemingly would require turning over otherwise privileged materials to them as well.

The majority's reading of *United States* v. *Nixon* – that otherwise privileged conversations must "be subordinated to the needs of the federal government's own criminal justice processes" (App. 15a) – has a comparable sweep. So too for the majority's reliance (*id.* at 17a) on the fact that governmental agencies cannot be indicted. In the first place, the existence of the privilege has never been thought to depend on whether the privilege holder is susceptible to indictment; otherwise an immunized person would lose his attorney-client privilege, which is surely not the law. Moreover, the majority's rationale proves too much. A federal agency also cannot be indicted in a case in which a criminal defendant seeks access to government attorney-client materials, or in a state grand jury investigation or trial, nor can it be made liable in a private *qui tam* action.

These implications may have caused the court of appeals little concern because, as it acknowledged at the outset (App. 5a), it was not prepared to concede that there is a governmental attorney-client privilege in *any* setting. But by deciding the case as it has, the majority has invited litigants and other courts to extend its supposedly limited ruling to a wide array of other contexts.

The uncertainties posed by the court of appeals' decision, both for the White House and for other governmental agencies, warrant further review and cannot await the next case. Agencies and their employees need to know, and know now, whether their communications with government counsel are likely to be compromised by grand jury inquiry.

B. The Court Of Appeals' Decision Is Wrong

If the decision below were correct, federal agencies would be obliged to accept this substantial impairment of their ability to consult with, and receive frank advice from,

counsel. In at least two respects, however, the decision – which the majority chose to apply retroactively to the communications with the First Lady – is deeply and indefensibly wrong: it carves out an unprecedented exception from the scope of the attorney-client privilege (which has never before been held to apply only in *certain* contexts but not others); and it rests on a misguided conception of what governmental agencies and their lawyers do for a living. A heavy burden falls to the proponent of such "a radical reworking of our law" (*Osborne* v. *Ohio*, 495 U.S. 103, 119 (1990)), which neither the IC nor the majority below has carried.

1. The decision misapprehends basic principles of attorney-client privilege

The court of appeals' decision is rather "like a restricted railroad ticket, 'good for this day and train only.'" *County of Washington* v. *Gunther*, 452 U.S. 161, 183 (1981) (Rehnquist, J., dissenting). According to the majority, even if the Office of the President could assert a privilege had these notes been sought in civil discovery, or perhaps even for use in state criminal proceedings – nevertheless, in this purportedly special context, the privilege simply evaporates. There is absolutely no basis for carving out from the long-settled and time-honored principles of attorney-client privilege a special exception for federal grand jury subpoenas.

a. Although the court of appeals professed agnosticism on the point (App. 5a), there can be no question that the lower courts have recognized and applied the governmental attorney-client privilege in a wide array of contexts. As the majority conceded (*id.* at 10a), the courts have uniformly embraced the privilege in civil cases.[5] The

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[5] See, *e.g.*, *Wright* v. *OSHA*, 822 F.2d 642, 648 (7th Cir. 1987) (attorney-client privilege protects communications between OSHA and Solicitor of Labor); *Covington & Burling* v. *Food & Nutrition*

Restatement reflects this consensus view. Section 124, which was approved by the American Law Institute in May 1996 (see 64 U.S.L.W. 2739), is entitled "Privilege for Governmental Client" and states "the generally prevailing rule that governmental agencies and agents enjoy the **same** privilege as non-governmental counterparts." Comment b, at 409 (emphasis added). Similarly, the Advisory Committee's note to Proposed Fed. R. Evid. 503, dealing with the attorney-client privilege, provides that its "definition of 'client' includes governmental bodies." Advisory Comm. Note to Standard 503, Subdivision (a)(1).

Congress, too, has recognized the appropriateness of a governmental attorney-client privilege. Exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(5), excepts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." By its terms, Exemption 5 entitles the government to withhold under FOIA any documents that it would be privileged to withhold in litigation. And Congress made quite clear that the attorney-client privilege was one of the privileges available to the government. As this Court explained in *NLRB* v. *Sears,*

Service, 744 F. Supp. 314, 323 (D.D.C. 1990) (privilege protects communications between attorneys and officials of the FNS); *Donovan* v. *Teamsters Union Local 25*, 103 F.R.D. 550, 552 (D. Mass. 1984) ("[t]he attorney-client privilege does apply 'in the governmental context'"); *Green* v. *IRS*, 556 F. Supp. 79, 85 (N.D. Ind. 1982) (the attorney-client privilege "unquestionably is applicable to the relationship between Government attorneys and administrative personnel"), aff'd, 734 F.2d 18 (7th Cir. 1984); *SEC* v. *World-Wide Coin Investments, Ltd.*, 92 F.R.D. 65, 67 (N.D. Ga. 1981) (privilege protects communications between SEC staff investigator and SEC attorneys); *Jupiter Painting Contracting Co.* v. *United States*, 87 F.R.D. 593, 598 (E.D. Pa. 1980) ("[c]ourts generally have accepted that attorney-client privilege applies in the governmental context").

Roebuck & Co., 421 U.S. at 154, "[t]he Senate Report states that Exemption 5 'would include the working papers of the agency attorney and documents which would come within the attorney-client privilege if applied to private parties.'" Accord, *e.g.*, *Mead Data Central, Inc.* v. *United States Dep't of Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977) (Exemption 5 "covers professional advice on legal questions which bears on [agency] decisions"). Congress, in short, authorized agencies to withhold materials on attorney-client privilege grounds precisely because such a privilege would be available to the agency in litigation.

b. The court of appeals also was wrong in asserting that it was writing on a clean slate. In conflict with the decision below, the Sixth Circuit has concluded that the governmental attorney-client privilege is available *in the context of grand jury proceedings*. In *In re Grand Jury Subpoena*, 886 F.2d 135 (6th Cir. 1989), the City of Detroit sought to quash a federal grand jury subpoena seeking minutes of City Council meetings on the ground that the minutes were protected by the attorney-client privilege. The Sixth Circuit vacated the district court's order enforcing the subpoena and remanded the case for a determination whether the meetings were confidential under state law. The court plainly took *as a given* that a governmental attorney-client privilege can be asserted in a federal grand jury proceeding, otherwise its consideration of the factual question whether the predicates of the privilege had been satisfied would have been senseless. See also *In re Grand Jury Subpoenas Duces Tecum Served by the Sussex County Grand Jury*, 241 N.J. Super. 18, 574 A.2d 449 (1989) (holding that an attorney employed by a county board of freeholders could not be made to reveal client communications to a grand jury investigating the county).[6]

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[6] The dearth of precedent on this point is no doubt due to the fact that (a) any such intrabranch disputes would ordinarily (outside

c. The court of appeals reasoned, however, that even if an attorney-client privilege would otherwise apply to these notes, the privilege simply disappears in the face of a federal grand jury subpoena. It must be said, at the outset, that the court's conception of attorney-client privilege is wholly unknown to the law. Until the decision below, no court had *ever* held that the attorney-client privilege applies in some contexts but not others. Rather, attorney-client privilege applies across the board; unless some exception to the privilege is present (and the majority identified none), the privilege applies *whatever* the context.

Thus, for example, no court had ever before held that the same attorney-client communication is privileged in some litigation settings but not others, for some corporate transactions but not others, in some criminal investigations but not others. If the attorney-client privilege were subject to such context-specific loopholes, it would be a highly uncertain protection: no client could possibly know whether his confidential communications to counsel will be fully protected. As this Court has cautioned, "[a]n uncertain privilege * * * is little better than no privilege at all." *Upjohn*, 449 U.S. at 393. Accord, *Jaffee* v. *Redmond*, 116 S. Ct. 1923, 1932 (1996).

The court of appeals' exception for federal grand jury proceedings thus entails a reformulation of the very idea of attorney-client privilege. None of the majority's reasons, however, justifies such a change in the law. True, "a grand jury has broad investigatory powers" (App. 13a), but courts

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the IC-type situation) be resolved by consultation between agency heads or, if necessary, by the chief executive, but not by the courts; and (b) no previous Independent Counsel has had the audacity or imagination to launch such a direct attack upon the seemingly well-established rights of government clients to unfettered assistance of counsel.

have regularly sustained attorney-client privilege claims in response to grand jury inquiries. See, *e.g.*, *In re Grand Jury Subpoenas Duces Tecum*, 798 F.2d 32 (2d Cir. 1986); *In re Grand Jury Subpoena*, 788 F.2d 1511 (11th Cir. 1986), modifying 765 F.2d 1014 (11th Cir. 1985). Nor does this Court's ruling in *Nixon* lend the slightest support to the decision below. Even the majority recognized (App. 15a) that *Nixon* "is not directly controlling" because the President never asserted attorney-client privilege in that case.

If anything, *Nixon* forecloses, not supports, the majority's decision. Although the *Nixon* Court agreed that "'the public * * * has a right to every man's evidence,'" it emphasized that there is an exception for "common-law * * * privileges," including for "an attorney or a priest[, who] may not be required to disclose what has been revealed in professional confidence." 418 U.S. at 709.

As for the court of appeals' refusal to apply the principles of *Upjohn*, here too its decision is flawed at every turn. That the White House cannot be indicted is beside the point, as it ignores the very premise of *Upjohn* – that clients need legal advice not only to fend off litigation but also so that they can know what their rights and duties are and thereby "promote broader public interests in the observance of law and administration of justice." 449 U.S. at 389. And the majority's notion that corporate attorneys have a more compelling interest than government attorneys "in ferreting out any misconduct by employees" (App. 17a) rests on a strange concept of governmental responsibilities.[7]

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[7] The majority's reliance (App. 17a) on 28 U.S.C. § 535(b) for the proposition that government attorneys, unlike private attorneys, "are under a statutory duty to report criminal wrongdoing by other employees" is contrary to both the legislative history of the provision (see H.R. Rep. No. 2622, 83rd Cong., 2d Sess. (1954)) and the consistent interpretation of the Department of Justice. See *Memorandum for the Acting Assistant Attorney General re: Duty of*

2. The decision misconceives the role and responsibilities of federal government employees and attorneys

The majority's central rationale (App. 17a) is that "the general duty of public service calls upon federal employees and agencies to favor disclosure over concealment." In the majority's view, "[t]he public responsibilities" of government entities are "reason enough to find *Upjohn* unpersuasive." *Id.* at 17a, 18a. That sentiment – which in the majority's estimation was "more important[]" (*id.* at 17a) to its resolution of the case than any other – reflects an oversimplified conception of how the federal government works, and a basic misapprehension about the roles and duties of federal government attorneys.

In the first place, the relevant issue is not "concealment," as the majority supposed. It is instead the appropriate balancing of the public's interest in the business of government and the need for confidentiality. And while the federal government has a general statutory obligation under FOIA, 5 U.S.C. § 552, to make its records available to the public, it is an utter non-sequitur to infer (as the majority does) that the government has some overarching "duty * * * to favor disclosure," regardless of the competing costs and benefits. Such an unnuanced conception of the functions of government ignores, among other things, the many exceptions to disclosure under FOIA (*id.* § 552(b)), which include material that would be protected by the attorney-client privilege or the work product doctrine in private litigation

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Government Lawyer Upon Receipt of Incriminating Information in the Course of an Attorney-Client Relationship With Another Government Employee (Mar. 29, 1985), at 4 (reprinted at White House App. 49a-59a). See also Opinion of Nov. 30, 1976, at 5-7 (White House App. 64a-66a); Opinion of Aug. 30, 1978, at 9-10 (White House App. 88a-89a); Opinion of Apr. 3, 1979, at 4 (White House App. 100a).

(see *supra* at 19-20). As the Court noted in *Nixon*, confidentiality in appropriate cases has been central to the proper functioning of the Republic ever since the Constitutional Convention – a gathering that was itself conducted in secret and the records of which were sealed for 30 years. 418 U.S. at 705 n.15.

The court of appeals' parallel belief that government attorneys cannot "shield" the information they learn from their agency clients is just as wrongheaded. Government lawyers are not "'independent auditor[s],'" as the majority mistakenly suggested (App. 17a); they are, instead, *attorneys*, first and foremost, as to whom (wholly unlike auditors) there is a venerable tradition of protected communications. And government attorneys are bound by much the same ethical and disciplinary rules as lawyers in the private sector, including the duty to maintain the confidentiality of client communications and client secrets. See ABA Informal Opinion 1413 (1978); D.C. Bar Ethics Opinion 148 (1985). In the District of Columbia, where a substantial number of government attorneys practice and where the attorney notes at issue in this case were created, the Rules of Professional Conduct provide that for purposes of the general obligation of client confidentiality, "[t]he client of the government lawyer is the agency that employs the lawyer unless expressly provided to the contrary by appropriate law, regulation or order." D.C. Rules of Professional Conduct, Rule 1.6(i).[8] Those rules preclude *all* lawyers – government and private alike – from disclosing a client's secrets except "[w]hen permitted by the[] Rules or required by law or court order,"

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[8] Although virtually all of the relevant events in this case took place in the District of Columbia, and the attorneys who took the subpoenaed notes were governed by D.C. Bar rules, the Independent Counsel elected to issue the subpoena out of his Arkansas grand jury, rather than out of his D.C. grand jury (where the First Lady had testified).

and provide an additional exception for government lawyers only for circumstances in which disclosure is "authorized by law." *Id.* Rule 1.6(d)(2).[9]

The court of appeals ignored these basic principles, opining instead that government agencies and employees have a duty to favor disclosure. That fundamental misconception about the relationship between the government and its lawyers lies at the very heart of the majority's evisceration of the attorney-client privilege in this case.[10]

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[9] The Comment to Rule 1.6 explains that the additional exception for government attorneys applies only in those situations in which the government authorizes or requires disclosure "by statute, executive order, or regulation, depending on the constitutional or statutory powers of the authorizing entity."

[10] The majority's peculiar conception of the responsibilities of government agencies and lawyers also impaired its analysis of the common interest issue. The majority agreed that both petitioner and the First Lady were "concerned with understanding fully the facts involved in the OIC's investigation," and that each had an interest in "dividing responsibility between the personal attorneys and White House counsel." App. 22a. But the majority discounted these concerns, and others (see *ibid.*), as "amount[ing] to no more than an assertion that 'we all want to obey the law'" — and in its view, the common-interest doctrine does not "stretch[] that far." But assisting clients, including governmental agencies, in understanding and "obey[ing] the law" is precisely what *Upjohn* is about. The majority simply never explained why the common interest doctrine — which even the majority recognized (*id.* at 21a) to be a "loose standard" — could not embrace such a core concern of the attorney-client privilege.

3. Even if petitioner's attorney-client privilege were not absolute in an IC investigation, it would still warrant far greater weight than the court of appeals gave it

Even if it were appropriate in an IC investigation to apply a balancing test in assessing claims of governmental attorney-client privilege, surely the privilege would not simply evaporate each time the IC made the unilateral decision to issue a grand jury subpoena. To the contrary, the balancing test articulated in *Nixon* to deal with the qualified executive privilege (and certainly any balancing test that might supplant the traditional absolute privilege for attorney-client communications) would require the IC to make a strong showing of need in order to overcome the protections of the privilege. Here, too, the court of appeals went astray by diluting to the vanishing point even the qualified privilege articulated in *Nixon*.

This Court ruled in *Nixon* that only a "demonstrated, *specific* need" for evidence, sufficient to persuade the trial court that the subpoenaed material is "'*essential* to the justice of the [pending criminal] case,'" would suffice to overcome the presumptive executive privilege for White House communications. 418 U.S. at 713 (emphasis added; brackets in the original). In *Nixon* itself, the Special Prosecutor sought the materials in connection with a *pending criminal trial* – a case in which indictments had issued of the very persons whose voices appeared on the subpoenaed tapes – and established both the "relevance" and the "admissibility" of the subpoenaed materials. *Id.* at 700-701. What is more, the Special Prosecutor demonstrated that "[t]he subpoenaed materials [were] not available from any other source * * *." *Id.* at 702. Thus, the Court ultimately concluded that the Special Prosecutor had made a showing sufficient to overcome the qualified executive privilege.

The court below read *Nixon* very differently. In its view (App. 13a n.9), the burden fell to petitioner (not the Independent Counsel) and required petitioner to show "'that there is no reasonable possibility that the category of materials the [IC] seeks will produce information relevant to the general subject of the grand jury's investigation.'" That burden, of course, is nothing more than what Fed. R. Crim. P. 17 would impose *in the absence of any privilege*. See *United States* v. *R. Enters., Inc.*, 498 U.S. 292, 301 (1991). In short, under the court of appeals' decision, the "balancing test" articulated in *Nixon* – if applicable in this context – would invariably be struck in the IC's favor, regardless of any showing of need. That cannot possibly be the law.

II. THE DECISION BELOW RESTS ON A MISTAKEN CONCEPTION OF THE WORK PRODUCT DOCTRINE

The court of appeals declined to apply the work product doctrine because, in its view, the subpoenaed notes were not "'prepared in anticipation of litigation.'" App. 25a. The court's cramped conception of "litigation," however, turns a blind eye to both legal and political realities.

A. The majority recognized (App. 26a) that the subpoenaed notes were created in preparation for congressional hearings involving the White House. It also acknowledged (*ibid.*) the Restatement's position that "litigation 'includes * * * an investigative legislative hearing.'" The present case illustrates why that is so. The notes were taken in connection with an effort to prepare the Office of the President for hearings before the Senate Whitewater Committee. That Committee's proceedings, which focused almost entirely on the White House, were no less adversarial than traditional litigation. The Chief Counsel, for example, was a former U.S. Attorney, and minority counsel a former Watergate prosecutor. Witnesses were grilled and rehabilitated, exhibits were introduced as at trial,

and at one point the Chief Counsel even gave a "summation" of his evidence to date.[11] And at the end of the process, findings of "fact" were issued by both the majority and minority, just as they might be by a judge or jury.

The policies that underlie the work product privilege are as fully implicated in a contentious and politically charged congressional hearing controlled by the opposition political party as they are in ordinary litigation. To the extent the subpoenaed notes were created in anticipation of these legislative hearings, the work product doctrine should apply. The alternative would permit the unseemly spectacle of calling government lawyers who helped prepare their agencies' representatives for congressional hearings and questioning them about the strategy they proposed to their clients.[12]

The majority declined to consider congressional hearings to be "litigation" because "the only harm that could come to the Agency as a result of such an investigation is political harm." App. 27a. It is not clear what the court of appeals meant by "political harm," but to the extent that the term encompasses a diminution in the ability of the Office of the President to deal with Congress or to garner public support for its positions or to focus its energies on the daily business of the executive branch, these elements of the "political" process lie at the very heart of our system of government. In any event, before this case no court (to our knowledge) had

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[11] See Maraniss, *The Hearings End Much as They Began*, Wash. Post, June 19, 1996, at A1; Melton, *For Whitewater Committee Counsel, a Painstaking Approach*, Wash. Post, Apr. 8, 1996, at A19.

[12] Under the court of appeals' decision, work product of counsel for *private* parties prepared in anticipation of legislative hearings would likewise be subject to disclosure.

ever held that a party must face a particular type of litigation *harm* before it may claim the work product protection.

B. The subpoenaed notes were also created in anticipation of ongoing grand jury proceedings that resulted in numerous document subpoenas to the White House and questioning of many White House employees and officials. The court of appeals held that this, too, was not "litigation" for purposes of the work product doctrine. In the court's view, the IC is investigating only White House *officials*, not the White House itself, and it could find no authority permitting a work product claim merely because "some other person," such as the First Lady, "was anticipating litigation." App. 26a.

Here, again, the court misunderstood the work product protection. Although the "White House" itself cannot be a party to a criminal or civil proceeding, its constituent parts certainly can. When the official conduct of key members of the White House is being investigated by a grand jury, the institutional interests of the Office of the President are obviously at stake. Moreover, the White House itself has been the recipient of numerous IC subpoenas, *including the one at issue in this proceeding*. In order for White House lawyers to represent their client's interests adequately, they must be able to record their thoughts and mental impressions freely, without fear that those documents will automatically be discoverable and that candid assessments might be used to call the operations of their client into question.

The majority's narrow conception of work product would greatly compromise the ability of government lawyers to represent their clients' broad institutional interests during criminal or civil investigations. Unless representation of those interests is to be accorded a lesser status than the myriad of other representations in which lawyers engage – and the court of appeals did not suggest why that should be so – the privilege is fully applicable in this setting.

* * * * *

There should be no mistake about the breadth and practical consequences of the Eighth Circuit's decision in this case. If the majority is correct, then the next step will be for the grand jury to require the White House Counsel or other government attorneys to testify about conversations with the President or other government officials concerning the legal advice they have given and the information they gathered in their internal investigations. If that is to be the law, it should be announced by this Court, not by a 2-1 majority of the court of appeals.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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May 1997

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[*] Pursuant to authorization of the Attorney General, undersigned counsel, serving as special government employees, have been assigned to represent the petitioner.

APPENDIX

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 96-4108

In re: Grand Jury Subpoena Duces Tecum	* * * * *	Appeal from the United States District Court for the Eastern District of Arkansas

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Submitted: February 13, 1997

Filed: April 9, 1997

Amended and Unsealed: May 2, 1997

Before BOWMAN and WOLLMAN, Circuit Judges, and KOPF,[1] District Judge.

BOWMAN, Circuit Judge.

The Office of Independent Counsel (OIC) appeals from an order of the District Court denying the OIC's motion to compel the production of documents subpoenaed by a federal grand jury. We reverse and remand.

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[1] The Honorable Richard G. Kopf, United States District Judge for the District of Nebraska, sitting by designation.

I.

The task assigned to Independent Counsel Kenneth W. Starr is to investigate and prosecute matters "relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc." *In re Madison Guar. Sav. & Loan Ass'n*, Div. No. 94-1, Order at 1-2 (D.C. Cir. Sp. Div. Aug. 5, 1994). Mr. Starr also is charged with the duty of pursuing evidence of other violations of the law developed during and connected with or arising out of his primary investigation, known generally as "Whitewater." See *id.* *See generally United States v. Tucker*, 78 F.3d 1313 (8th Cir.), *cert. denied*, 117 S. Ct. 76 (1996).

On June 21, 1996, as part of its investigation, the OIC directed to the White House a grand jury subpoena that required production of "[a]ll documents created during meetings attended by any attorney from the Office of Counsel to the President and Hillary Rodham Clinton (regardless whether any other person was present)" pertaining to several Whitewater-related subjects. Subpoena Rider at 1. The White House identified nine sets of notes responsive to the subpoena but refused to produce them, citing executive privilege, attorney-client privilege, and the attorney work product doctrine.

On August 19, 1996, the OIC filed a motion before the District Court to compel production of two of the nine sets of documents identified by the White House. The first set of documents comprises notes taken by Associate Counsel to the President Miriam Nemetz on July 11, 1995, at a meeting attended by Mrs. Clinton, Special Counsel to the President Jane Sherburne, and Mrs. Clinton's personal attorney, David Kendall. The subject of this meeting was Mrs. Clinton's activities following the death of Deputy Counsel to the President Vincent W. Foster, Jr. The documents in the second collection are notes taken by Ms. Sherburne on January 26,

1996, during meetings attended by Mrs. Clinton, Mr. Kendall, Nicole Seligman (a partner of Mr. Kendall's), and, at times, John Quinn, Counsel to the President. These meetings, which took place during breaks in and immediately after Mrs. Clinton's testimony before a federal grand jury in Washington, D.C., concerned primarily the discovery of certain billing records from the Rose Law Firm in the residence area of the White House.

The White House abandoned its claim of executive privilege before the District Court, relying solely on the attorney-client privilege and the work product doctrine. Mrs. Clinton also entered a personal appearance through counsel in the District Court and asserted her personal attorney-client privilege. The District Court found it unnecessary to reach the broadest question presented by the OIC, whether a federal governmental entity may assert the attorney-client privilege or the work product doctrine in response to a subpoena by a federal grand jury. Instead, the court concluded that because Mrs. Clinton and the White House had a "genuine and reasonable (whether or not mistaken)" belief that the conversations at issue were privileged, the attorney-client privilege applied. Memorandum Opinion and Order at 20. In addition, the court held that the work product doctrine prevented disclosure of the notes to the grand jury. See *id.* at 22.

The OIC appealed, and we granted expedited review. Mrs. Clinton moved to intervene formally, and we granted her motion. The case was submitted following oral arguments in a closed session. The District Court did not find it necessary to examine the disputed materials in camera, see *id.* at 18 n.10, and neither do we.[2]

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[2] We wish to commend the parties on the quality of their briefs and oral arguments despite the expedited appeal process.

At the request of the White House, and in order to preserve the secrecy of the grand jury's proceedings, we filed our opinion under seal on April 9, 1997, intending to publish a redacted opinion shortly thereafter. Since we filed our opinion, however, press reports have related some of the substance of our decision. Believing that these disclosures have portrayed the White House in an unfairly negative light, the White House and Mrs. Clinton moved this Court to publish its opinion and to unseal the briefs and appendices filed in this Court, and the OIC joined in the motion. The motion is granted. Accordingly, this opinion, as amended, together with Judge Kopf's dissent, is released for publication, and the briefs and appendices are ordered unsealed.

II.

We first consider our jurisdiction to entertain this appeal. An order of a district court denying a motion to quash a grand jury subpoena--that is, an order requiring compliance with the subpoena--is not immediately appealable. *See Cobbledick v. United States*, 309 U.S. 323, 327-28 (1940). *But see United States v. Nixon*, 418 U.S. 683, 691-92 (1974) (determining that, in unique context of case, President could appeal without first being cited for contempt). This case presents the opposite situation: an order refusing to require compliance with a subpoena. An order granting a motion to quash a subpoena is an appealable order, either under 18 U.S.C. § 3731 (1994) (permitting government to appeal from an order "excluding evidence . . . in a criminal proceeding"), or under 28 U.S.C. § 1291 (1994) (permitting appeals from "all final decisions of the district courts"). See *In re Grand Jury Subpoena (Kent)*, 646 F.2d 963, 967-68 (5th Cir. Unit B June 1981); *In re Grand Jury Empanelled Feb. 14, 1978 (Colucci)*, 597 F.2d 851, 854-58 (3d Cir. 1979). It makes no practical difference that the instant case involves the denial of a motion to enforce a subpoena rather than the grant of a motion to quash a subpoena. We conclude that we have jurisdiction over this appeal.

Although this case is a dispute between two entities of the federal government, i.e., the White House and the OIC, it presents a justiciable controversy. See *Nixon*, 418 U.S. at 697.

III.

We will address first the issue that the District Court found it unnecessary to decide: whether an entity of the federal government may use the attorney-client privilege to avoid complying with a subpoena by a federal grand jury. Before we confront the merits of this question, however, we believe it is important to identify what is not at issue in this case. The OIC does not seek to invade the attorney-client relationship existing between Mrs. Clinton, in her personal capacity, and Mr. Kendall, her personal lawyer. The privilege set up by the White House is strictly a governmental privilege, with the White House (or the Office of the President, alternatively) as client and Ms. Sherburne and Ms. Nemetz as attorneys. Accordingly, the White House is the real party in interest in this case, although Mrs. Clinton presents arguments similar to those of the White House in her capacity as an intervenor.

The discussion that follows can be summed up rather simply. We need not decide whether a governmental attorney-client privilege exists in other contexts, for it is enough to conclude that even if it does, the White House may not use the privilege to withhold potentially relevant information from a federal grand jury.

A.

"[T]he privilege of a witness, person, government, State, or political subdivision thereof [is] governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Fed. R. Evid. 501. We must therefore apply the federal common law of attorney-client privilege to the situation presented by this case. See *In re Bieter Co.*, 16 F.3d 929, 935 (8th Cir. 1994).

The OIC and the White House have taken strikingly different rhetorical approaches to the question presented here. The OIC argues that recognizing an attorney-client privilege in these circumstances would be tantamount to establishing a new privilege, which courts ordinarily undertake with great reluctance. The White House, in contrast, argues that the attorney-client privilege is already the best-established of the common-law privileges and that, furthermore, it is an absolute privilege. The White House is correct, of course, in its assertion that the attorney-client privilege is the oldest known to the common law. See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). But the lengthy roots of the privilege do not necessarily mean that it must apply in this dispute within the federal government, especially because the privilege has not previously been so applied. Nor does the White House advance its case significantly by arguing that the attorney-client privilege is absolute, in the sense that it cannot be overcome by a showing of need. See, *e.g.*, *Admiral Ins. Co. v. United States Dist. Court*, 881 F.2d 1486, 1493-94 (9th Cir. 1989). This argument merely begs the true question, whether a governmental attorney-client privilege exists at all in the context of a federal criminal investigation.

We address this question by beginning with Proposed Federal Rule of Evidence 503, which we have described as "a useful starting place" for an examination of the federal common law of attorney-client privilege. *In re Bieter Co.*, 16 F.3d at 935. As promulgated by the Supreme Court in 1972, Proposed Rule 503 would have defined "client" to include "a person, public officer, or corporation, association, or other organization or entity, either public or private." Proposed Fed. R. Evid. 503(a)(1), *reprinted in* 56 F.R.D. 183, 235 (1972). The commentary makes it clear that "[t]he definition of 'client' includes governmental bodies." *Id.* advisory committee's note. But neither the proposed rule nor the commentary has anything to say about the particular situation before us in this case; they

represent only the broad proposition that a governmental body may be a client for purposes of the attorney-client privilege.[3]

Other compilations of the general law have taken similar approaches. *See* Restatement (Third) of the Law Governing Lawyers § 124 (Proposed Final Draft No. 1, 1996) [hereinafter Restatement] ("[T]he attorney-client privilege extends to a communication of a governmental organization.");[4] Unif. R. Evid. 502(a)(1) (defining "client" in terms similar to Proposed Fed. R. Evid. 503). Each of these authorities, however, expresses at least some concern about applying the privilege broadly to governmental entities. Uniform Rule 502 limits the governmental privilege to situations involving a pending investigation or litigation and requires a finding by the court that disclosure will "seriously impair" the agency's pursuit of

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[3] Judge Kopf's dissent relies too heavily, we believe, on the precise wording of Proposed Rule 503. Although we have found the proposed rule accurate in other cases that have come before us, *see In re Bieter Co.*, 16 F.3d at 935, it bears repeating that we are instructed by Rule 501 to interpret the attorney-client privilege "in light of reason and experience" and not solely in light of the rule promulgated by the Supreme Court in 1972. Even the Court itself at times has interpreted privileges differently from the rules it proposed. *See Jaffee v. Redmond*, 116 S. Ct. 1923, 1931 (1996) (concluding that psychotherapist-patient privilege encompasses communications to social workers, contrary to Proposed Rule 504); *Trammel v. United States*, 445 U.S. 40, 51-53 (1980) (recognizing marital privilege entirely different from Proposed Rule 505).

[4] The American Law Institute has approved the chapter of Proposed Final Draft No. 1 of the Restatement governing the attorney-client privilege and the work product doctrine. *See* 64 U.S.L.W. 2739 (May 28, 1996).

the investigation or litigation. *See* Unif. R. Evid. 502(d)(6).[5] Language in the Restatement addresses even more directly the concerns relevant in the instant case:

> More particularized rules may be necessary where one agency of government claims the privilege in resisting a demand for information by another. Such rules should take account of the complex considerations of governmental structure, tradition, and regulation that are involved.

Restatement § 124 cmt. b. We agree with this language from the Restatement and accordingly look to the case law for further guidance.

The White House has located only two cases involving a clash between a grand jury and a claim of governmental attorney-client privilege. In *In re Grand Jury Subpoenas Duces Tecum (Farber)*, 574 A.2d 449 (N.J. Super. Ct. App. Div. 1989), a New Jersey intermediate appellate court considered two subpoenas issued by a county grand jury to private lawyers who had been retained to represent a county agency. The court concluded that "the privilege is fully applicable to communications between a public body and an attorney retained to represent it," *id.* at 454, but reversed the lower court's order quashing the subpoenas because the attorneys should have been required to appear before the grand jury and invoke the privilege in response to specific questions, *see id.* at 458. In *In re Grand Jury Subpoena (Doe)*, 886 F.2d 135 (6th Cir. 1989), the Sixth Circuit considered a subpoena issued by a federal grand jury to the city of Detroit. The court vacated the district court's finding that the city council was not the

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[5] The White House correctly points out that a number of the states adopting the Uniform Rules have omitted the limitation in Rule 502(d)(6). *See, e.g.*, Neb. Rev. Stat. § 27-503(4) (1995). These omissions, however, prove no more than does the lack of specific language in Proposed Federal Rule 503.

client of the city's corporation counsel but concluded that the application of the attorney-client privilege depended on the confidentiality of the communications, which in turn depended on the proper application of the state open-meetings law. *See id.* at 138. The court remanded the case to allow the district court to resolve that issue. *See id.* at 139.

For several reasons, we do not find these cases particularly persuasive. First, neither court actually applied a governmental attorney-client privilege to block a grand jury's investigation; both found it necessary to remand for further proceedings. We hesitate to ignore judicial pronouncements too readily as mere dicta, however, for we must find guidance somewhere in the parties' proffered authorities, none of which is directly in point. Several significant factual distinctions between the aforementioned cases and the case at bar are therefore also relevant. The New Jersey case involved the interaction between a county grand jury and a county agency, a subject which is undoubtedly of considerable importance to the state of New Jersey but does not bear directly on the relationship of a federal grand jury to a federal entity. In addition, that case involved private attorneys hired as special counsel to the county agency, and the court recognized that the private lawyers were not subject to a state statute requiring all public employees to testify before any grand jury in exchange for use immunity. *See In re Grand Jury (Farber)*, 574 A.2d at 455. It is, of course, impossible for us to determine how the New Jersey court would have harmonized this statute with the asserted governmental attorney-client privilege if the attorney involved had been a public employee. The Sixth Circuit case, involving a standoff between a federal grand jury and a city government, implicates potentially serious federalism concerns not present in the case before us. The court's brief opinion is also rather unpersuasive legally, as it contains no acknowledgment that to extend the privilege to a governmental body where individuals within the government are being scrutinized by a grand jury for criminal activity poses anything but a routine concern. (The

court cited only two privilege cases, neither of which had anything to do with government lawyers.)

Moving somewhat further afield, the White House cites a number of cases in which courts have applied a governmental attorney-client privilege in civil actions. These cases, all of which involved either the sui generis jurisprudence of the Freedom of Information Act (5 U.S.C. § 552 (1994))[6] or a situation in which the party seeking information was a private litigant adversarial to the government,[7] are not particularly

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[6] *See Mead Data Cent., Inc. v. United States Dep't of Air Force*, 566 F.2d 242, 252-53 (D.C. Cir. 1977); *Covington & Burling v. Food & Nutrition Serv.*, 744 F. Supp. 314, 323 (D.D.C. 1990); *Badran v. United States Dep't of Justice*, 652 F. Supp. 1437, 1440 (N.D. Ill. 1987); *Green v. IRS*, 556 F. Supp. 79, 85-86 (N.D. Ind. 1982), *aff'd*, 734 F.2d 18 (7th Cir. 1984) (table); *cf. NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 154 (1975) (concluding that work product doctrine applies in FOIA cases); *Wright v. OSHA*, 822 F.2d 642, 648 (7th Cir. 1987) (holding that FOIA exemption for records compiled for law enforcement purposes incorporates attorney-client privilege); *Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors*, 69 Cal. Rptr. 480, 489 (Cal. Ct. App. 1968) (noting, in action under state public meeting act, that California cases have assumed that public agencies may assert privilege). *But cf. City of N. Miami v. Miami Herald Publ'g Co.*, 468 So. 2d 218, 220 (Fla. 1985) (ruling that state public records act does not exempt communications between attorneys and governmental clients, except during pendency of litigation); *News & Observer Publ'g Co. v. Poole*, 412 S.E.2d 7, 17 (N.C. 1992) (holding that state public records act exempts only written communications from attorney to governmental client, and only for three years).

[7] *See Scott Paper Co. v. United States*, 943 F. Supp. 489, 498-500 (E.D. Pa.) (Magistrate Judge) (dicta), *aff'd*, 943 F.

persuasive in the circumstances of this case. Even if we were to conclude that the governmental attorney-client privilege ordinarily applies in civil litigation pitting the federal government against private parties, a question that we need not and do not decide, we believe the criminal context of the instant case, in which an entity of the federal government seeks to withhold information from a federal criminal investigation, presents a rather different issue. *See Nixon*, 418 U.S. at 712 n.19 (suggesting that executive privilege may apply differently in criminal and civil cases); *Cervantes v. Time, Inc.*, 464 F.2d 986, 992-93 n.9 (8th Cir. 1972) (recognizing that reporter's privilege may apply differently in criminal and civil cases), *cert. denied*, 409 U.S. 1125 (1973); *Zerilli v. Smith*, 656 F.2d 705, 711-12 (D.C. Cir. 1981) (same).

Lacking persuasive direction in the case law, we turn to general principles.

Supp. 501 (E.D. Pa. 1996); *Donovan v. Teamsters Union Local 25*, 103 F.R.D. 550, 552-53 (D. Mass. 1984); *SEC v. World-Wide Coin Investments, Ltd.*, 92 F.R.D. 65, 66-67 (N.D. Ga. 1981); *Jupiter Painting Contracting Co. v. United States*, 87 F.R.D. 593, 598 (E.D. Pa. 1980); *Thill Sec. Corp. v. New York Stock Exch.*, 57 F.R.D. 133, 138-39 (E.D. Wis. 1972); *Detroit Screwmatic Co. v. United States*, 49 F.R.D. 77, 78 (S.D.N.Y. 1970); *United States v. Anderson*, 34 F.R.D. 518, 522-23 (D. Colo. 1963); *cf. In re Allen*, 106 F.3d 582, 600 n.8 (4th Cir. 1997) (noting that private party did not challenge applicability of privilege to government agency); *Mitzner v. Sobol*, 136 F.R.D. 359, 360-62 (S.D.N.Y. 1991) (suggesting that state agency may assert privilege) (dicta); *Bruce v. Christian*, 113 F.R.D. 554, 560 (S.D.N.Y. 1986) (holding that city agency may assert privilege); *State ex rel. Babbitt v. Arnold*, 548 P.2d 426, 428 (Ariz. Ct. App. 1976) (holding that county may assert privilege).

> "For more than three centuries it has now been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Hardwicke) has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule."

United States v. Bryan, 339 U.S. 323, 331 (1950) (quoting 8 J. Wigmore, *Evidence* § 2192 (3d ed. 1940)). Privileges, as exceptions to the general rule, "are not lightly created nor expansively construed, for they are in derogation of the search for truth." *Nixon*, 418 U.S. at 710. It is appropriate to recognize a privilege "'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'" *Trammel v. United States*, 445 U.S. 40, 50 (1980) (quoting *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)).

Federal common law recognizes a privilege only in rare situations. *See, e.g., Jaffee v. Redmond*, 116 S. Ct. 1923, 1931 (1996) (adopting psychotherapist-patient privilege); *University of Pa. v. EEOC*, 493 U.S. 182, 189 (1990) (rejecting academic peer review privilege); *United States v. Arthur Young & Co.*, 465 U.S. 805, 817 (1984) (rejecting work product immunity for accountants); *Upjohn*, 449 U.S. at 390, 397 (assuming, and effectively deciding, that corporation may assert attorney-client privilege); *United States v. Gillock*, 445 U.S. 360, 373 (1980) (rejecting speech-or-debate privilege for state legislators); *Trammel*, 445 U.S. at 51-53 (rejecting privilege against adverse spousal testimony, but continuing to recognize privilege for confidential marital communications); *Nixon*, 418 U.S. at 705-13 (recognizing qualified executive privilege); *Couch v. United*

States, 409 U.S. 322, 335 (1973) (rejecting accountant-client privilege); *Branzburg v. Hayes*, 408 U.S. 665, 690-91 (1972) (rejecting news reporter's privilege);[8] *In re Grand Jury (Virgin Islands)*, 103 F.3d 1140, 1146-47 (3d Cir. 1997) (rejecting, like eight other circuits, parent-child privilege); *Petersen v. Douglas County Bank & Trust Co.*, 967 F.2d 1186, 1188 (8th Cir. 1992) (rejecting insurer-insured confidentiality privilege); *United States v. Holmes*, 594 F.2d 1167, 1171 (8th Cir.) (rejecting probation officer-parolee privilege), *cert. denied*, 444 U.S. 873 (1979).

The White House does not dispute that a grand jury has broad investigatory powers.[9] As the Supreme Court has

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[8] Some courts have interpreted *Branzburg* as establishing a qualified news reporter's privilege. See *Shoen v. Shoen*, 5 F.3d 1289, 1292 & n.5 (9th Cir. 1993). *But see In re Grand Jury Proceedings (Storer)*, 810 F.2d 580, 583-86 (6th Cir. 1987) (rejecting this theory). Although the Ninth Circuit in *Shoen* cited our opinion in *Cervantes* for support, we believe this question is an open one in this Circuit.

[9] The White House does suggest that the OIC has not shown a "demonstrated, specific need" for the materials subpoenaed by the grand jury, citing *Nixon*, 418 U.S. at 713. We doubt that this language from *Nixon* constitutes the proper need threshold even on the facts of that case, as it appears in a general discussion, rather than in the Court's specific analysis of Fed. R. Crim. P. 17(c). See *id.* at 700. In a grand jury case, the burden is on the subpoenaed party to demonstrate "that there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation." *United States v. R. Enters., Inc.*, 498 U.S. 292, 301 (1991); *see also In re Grand Jury Proceedings (Cheetham)*, 791 F.2d 663, 665-66 (8th Cir. 1986) (recognizing that no showing of need for information is required). The White House's own descriptions

recognized, the principle that the public is entitled to "every man's evidence" is "particularly applicable to grand jury proceedings." *Branzburg*, 408 U.S. at 688. "[O]ur historic commitment to the rule of law," and particularly to the twin goals of criminal justice "'that guilt shall not escape or innocence suffer,'" are strong factors weighing against the applicability of a privilege. *Nixon*, 418 U.S. at 708-09 (citation omitted).

In essence, the parties' arguments center on two cases, neither of which is directly analogous to this case, but each of which has relevance to our decision: *Nixon* and *Upjohn*. In *Nixon*, a special prosecutor directed a subpoena duces tecum to President Nixon, seeking tapes and other materials for use in the criminal trial of seven defendants, including former White House officials. The President refused to comply with the subpoena, claiming executive privilege. After concluding that the special prosecutor had made the showing required by Federal Rule of Criminal Procedure 17(c) for a trial subpoena, *see id.* at 700, the Supreme Court considered the President's claim of privilege. The Court recognized that the need for confidential presidential communication "can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties," *id.* at 705, and that the privilege for presidential communications "is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution," *id.* at 708. Despite the strong constitutional foundations of the privilege, however, the Court concluded that it had to give way to the special prosecutor's subpoena:

> A President's acknowledged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production

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of the notes at issue in this case are sufficient to demonstrate their relevance to the OIC's investigation.

> of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice. Without access to specific facts a criminal prosecution may be totally frustrated. The President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases.

Id. at 712-13.

The OIC argues that under the logic of *Nixon*, the White House's claim of privilege must give way here, for if the governmental attorney-client privilege exists at all, it is certainly not constitutionally based. It is true, as the White House responds, that the President did not assert an attorney-client privilege in *Nixon*, and so the case is not directly controlling. We agree with the OIC, however, that *Nixon* is indicative of the general principle that the government's need for confidentiality may be subordinated to the needs of the government's own criminal justice processes.

The White House counters by pointing out that *Nixon* itself recognized the importance of common-law privileges, including the attorney-client privilege. *See id.* at 709-10. No one, the White House argues, would suppose that the special prosecutor could compel the production of notes made by a private lawyer concerning a conversation with a private client about even the most routine traffic ticket. Why then, the argument continues, should the benefit of this important privilege not be available to the White House?

Our discussion of the White House's primary argument, revolving around *Upjohn*, should demonstrate why we believe the private-attorney analogy is inapposite. The White House proffers *Upjohn* as emblematic of the wide sweep of the attorney-client privilege, and we agree with that characterization, to a point. In *Upjohn*, the IRS attempted to

subpoena records of an internal investigation conducted by Upjohn's general counsel. The court of appeals rejected Upjohn's claim of privilege to the extent that the communications at issue involved lower-level employees outside the so-called "control group." The Supreme Court rejected the "control group" test as unnecessarily restrictive, recognizing that if the attorney-client privilege is to have any value, it must encompass communications between attorneys and lower-level employees possessing relevant information:

> In the case of the individual client the provider of information and the person who acts on the lawyer's advice are one and the same. In the corporate context, however, it will frequently be employees beyond the control group as defined by the court below--'officers and agents . . . responsible for directing [the company's] actions in response to legal advice'--who will possess the information needed by the corporation's lawyers. Middle-level--and indeed lower-level--employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties.

Upjohn, 449 U.S. at 391 (alterations by Supreme Court). The Court did not specify the precise extent of the privilege but specifically rejected the "control group" test. *Id.* at 396-97.

As the White House points out, *Upjohn* contains strong language about the importance of the attorney-client privilege in encouraging the full and frank presentation of legal advice to corporations, which helps to insure that corporations will act within the law. *See id.* at 389, 392. And the Court recognized that "if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with

some degree of certainty whether particular discussions will be protected." *Id.* at 393. Nevertheless, we believe that important differences between the government and nongovernmental organizations such as business corporations weigh against the application of the principles of *Upjohn* in this case. First, the actions of White House personnel, whatever their capacity, cannot expose the White House as an entity to criminal liability. (No one suggests that any of the conduct under investigation by the OIC could expose the White House to civil liability.) A corporation, in contrast, may be subject to both civil and criminal liability for the actions of its agents, and corporate attorneys therefore have a compelling interest in ferreting out any misconduct by employees. The White House simply has no such interest with respect to the actions of Mrs. Clinton.

We also find it significant that executive branch employees, including attorneys, are under a statutory duty to report criminal wrongdoing by other employees to the Attorney General. *See* 28 U.S.C. § 535(b) (1994). Even more importantly, however, the general duty of public service calls upon government employees and agencies to favor disclosure over concealment. The difference between the public interest and the private interest is perhaps, by itself, reason enough to find *Upjohn* unpersuasive in this case. The importance of the public interest in questions of disclosure versus privilege is not unique to this case, for it was a key reason the Supreme Court rejected the concept of work product immunity for accountants:

> By certifying the public reports that collectively depict a corporation's financial status, the independent auditor assumes a *public* responsibility transcending any employment relationship with the client. The independent public accountant performing this special function owes ultimate allegiance to the corporation's creditors and stockholders, as well as to the investing public. This 'public watchdog' function demands that the accountant maintain total independence from the

> client at all times and requires complete fidelity to the public trust. To insulate from disclosure a certified public accountant's interpretations of the client's financial statements would be to ignore the significance of the accountant's role as a disinterested analyst charged with public obligations.

Arthur Young, 465 U.S. at 817-18. The public responsibilities of the White House are, of course, far greater than those of a private accountant performing a service with public implications. We believe the strong public interest in honest government and in exposing wrongdoing by public officials would be ill-served by recognition of a governmental attorney-client privilege applicable in criminal proceedings inquiring into the actions of public officials. We also believe that to allow any part of the federal government to use its in-house attorneys as a shield against the production of information relevant to a federal criminal investigation would represent a gross misuse of public assets. *See also Jupiter Painting*, 87 F.R.D. at 598 (recognizing the "pernicious potential" of a governmental attorney-client privilege "in a government top-heavy with lawyers").[10]

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[10] Judge Kopf cites several opinions of the Office of Legal Counsel for support. *See post* at 41-45. We find each of these opinions unpersuasive in the context of this case. Theodore Olson's 1982 opinion concerning the confidentiality of communications between the President and the Attorney General relies significantly on Freedom of Information Act cases and *Upjohn*, which we believe are not helpful to the White House in this case, and does not purport to address the viability of the privilege in the face of a grand jury subpoena. *See Memorandum for the Attorney General re: Confidentiality of the Attorney General's Communications in Counseling the President*, 6 Op. Off. Legal Counsel 481, 490-97 (1982). Each of the other opinions cited by the White House involves a government attorney representing a government official sued in

We recognize the White House's concern that "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn*, 449 U.S. at 393. Our first response is that the White House assumes that the attorney-client privilege is more predictable ex ante than it actually is. A client discussing an issue with a lawyer cannot know, for example, whether a bankruptcy trustee will later waive the privilege, *see Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 358 (1985), or whether the lawyer's assistance will later become an issue in a proceeding, *see* Restatement § 130(1), or whether the lawyer and client will later become involved in a dispute, *see* Restatement § 133, any of which may result in disclosure of the conversation. Even so, we believe our holding in this case does not make the duties of government attorneys significantly more difficult. Assuming arguendo that there is a governmental attorney-client privilege in other circumstances, confidentiality will suffer only in those situations that a grand jury might later see fit to investigate. Because agencies and entities of the government are not themselves subject to criminal liability, a government attorney is free to discuss anything with a government official--except for potential criminal wrongdoing by that official--without fearing later revelation of the conversation. An official who fears he or she may have violated the criminal law and wishes to speak with an attorney in confidence should speak with a private attorney, not a government attorney.

Nor do we foresee any likely effect of our decision on the ability of a government lawyer to advise an official who is

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his or her individual capacity in a *Bivens* action. In such a case, the government attorney enters into a personal attorney-client relationship with the individual defendant, and the usual privilege applies. *See* 28 C.F.R. § 50.15(a)(3) (1996). No such personal attorney-client relationship exists between Mrs. Clinton and the White House attorneys.

contemplating a future course of conduct. If the attorney explains the law accurately and the official follows that advice, no harm can come from later disclosure of the advice, which would be unlikely anyway. Like the *Nixon* Court, "we cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution." *Nixon*, 418 U.S. at 712. The White House's "chilling effect" argument is no more persuasive in this case than it was in *Nixon*.

B.

Before we can conclude that the White House may not use the attorney-client privilege to thwart the grand jury's subpoena, we must consider the assertion, made by both the White House and Mrs. Clinton, that the presence of Mr. Kendall, Mrs. Clinton's private attorney, during her meetings with the White House attorneys affects the calculus in this case. We disagree.

The White House and Mrs. Clinton rely on the common-interest doctrine, which expands the coverage of the attorney-client privilege in certain situations:

> If two or more clients with a common interest in a litigated or non-litigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged . . . that relates to the matter is privileged as against third persons. Any such client may invoke the privilege, unless it has been waived by the client who made the communication.

Restatement § 126(1); *see also* Proposed Fed. R. Evid. 503(b)(3), 56 F.R.D. at 236. This doctrine softens the ordinary requirement that lawyer-client communications must be made in confidence in order to be protected by the privilege. *See*

Restatement § 121; *John Morrell & Co. v. Local Union 304A, United Food & Commercial Workers*, 913 F.2d 544, 555-56 (8th Cir. 1990) (applying the doctrine), *cert. denied*, 500 U.S. 905 (1991).

One possible interpretation of the meetings at issue here is that they involved Mrs. Clinton in her personal capacity, her personal attorney, Mrs. Clinton as a representative of the White House (which we assume for the sake of argument would put her there in an official capacity), and the White House's official attorneys, in a type of four-sided conference. We will assume this scenario as a factual framework for the possible application of the common-interest doctrine. We conclude that the doctrine is inapplicable, for two distinct reasons.

First, as our discussion in Part III-A, *supra*, demonstrates, the White House's assumption that communications made by Mrs. Clinton to Ms. Sherburne and Ms. Nemetz "otherwise qualif[y] as privileged," Restatement § 126(1), begs the question we are called upon to decide. In addition, there is lacking in this situation the requisite common interest between the clients, who are Mrs. Clinton in her personal capacity and the White House. Mrs. Clinton's interest in the OIC's investigation is, naturally, avoiding prosecution, or else minimizing the consequences if the OIC decides to pursue charges against her. One searches in vain for any interest of the White House which corresponds to Mrs. Clinton's personal interest. The common interest may be "either legal, factual, or strategic in character," *id.* cmt. e, but no legitimate interest offered by the White House meets even this loose standard. Most of the interests put forward by the White House are summed up in this excerpt from its brief:

> Both [the White House and Mrs. Clinton] needed a full and accurate understanding of the facts surrounding the various incidents under investigation and of the legal consequences of those facts; both had an interest in ensuring that there was no distortion of

> these events by political and legal adversaries, and no misunderstanding of them by the public.

Br. of White House at 27. In addition, the White House and Mrs. Clinton cite the need for allocation of responsibility between personal and public attorneys, the desire to determine whether any White House policies need to be altered to prevent future difficulties, the fact that the OIC is investigating "official misconduct," and the ongoing Whitewater-related investigations by the RTC, FDIC, and Congress as factors creating a common interest between them.

We have no doubt that the White House and Mrs. Clinton are concerned with understanding fully the facts involved in the OIC's investigation, nor that dividing responsibility between the personal attorneys and White House counsel can be a difficult task. And surely the multiplicity of investigating authorities only complicates the lives of these attorneys. But these justifications amount to no more than an assertion that "we all want to obey the law." We do not believe the common-interest doctrine stretches that far.

As for the suggestion that the OIC is investigating "official misconduct," thus triggering the interest of the White House, we believe there is a difference between "official misconduct"--whatever that may be--and "misconduct of officials." The OIC is actually investigating the actions of individuals, some of whom hold positions in the White House. The OIC's investigation can have no legal, factual, or even strategic effect on the White House as an institution. Certainly action by the OIC may occupy the time of White House staff members, may vacate positions in the White House if any of its personnel are indicted, and may harm the President and Mrs. Clinton politically. But even if we assume that it is proper for the White House to press political concerns upon us, we do not believe that any of these incidental effects on the White House are sufficient to place that governmental institution in the same

canoe as Mrs. Clinton, whose personal liberty is potentially at stake.

The White House argues that it must be permitted to invoke the attorney-client privilege "'not for the benefit of the President as an individual, but for the benefit of the Republic.'" *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 449 (1977) (quoting the Solicitor General's brief filed in that case). Because, however, the White House and Mrs. Clinton have failed to establish that the interests of the Republic coincide with her personal interests, the attempt must fail.

C.

We next confront the conclusion of the District Court that Mrs. Clinton's reasonable belief that her conversations with White House lawyers were privileged is sufficient to prevent their disclosure. Because we conclude that this issue is irrelevant to the inquiry at hand, we need not examine whether Mrs. Clinton's belief was reasonable.

In some aspects of the law of attorney-client privilege, the client's reasonable beliefs may be relevant. For example, courts have found the privilege applicable where the client reasonably believed that a poseur was in fact a lawyer,[11] reasonably believed that a lawyer represented the client rather than another party,[12] or reasonably believed that a conversation

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[11] *See United States v. Mullen & Co.*, 776 F. Supp. 620, 621 (D. Mass. 1991) (dicta); *United States v. Tyler*, 745 F. Supp. 423, 425-26 (W.D. Mich. 1990); *United States v. Boffa*, 513 F. Supp. 517, 523 (D. Del. 1981) (dicta). *See generally* Restatement § 122(1).

[12] *See United States v. Hart*, No. Crim. A. 92-219, 1992 WL 348425, at *1-2 (E.D. La. Nov. 6, 1992); *cf. Wylie v. Marley Co.*, 891 F.2d 1463, 1471-72 (10th Cir. 1989) (finding no abuse of discretion in district court's application of privilege where

with a lawyer was confidential, in the sense that its substance would not be overheard by or reported to anyone else.[13] All these situations involve, in essence, reasonable mistakes of fact, none of which is applicable here. Because Mrs. Clinton does not claim that she believed that the White House lawyers represented her personally, her argument must be that she believed that the law sweeps broadly enough to cloak these conversations within the attorney-client privilege.[14] But we know of no authority, and Mrs. Clinton has cited none, holding that a client's beliefs, subjective or objective, about the law of privilege can transform an otherwise unprivileged conversation into a privileged one.

As the OIC notes, only rarely does the law take account of an actor's beliefs about the law at the time he or she took action: the doctrine of qualified immunity, the non-applicability of new rules of constitutional law to federal habeas petitions brought by state prisoners, and the good-faith exception to the warrant requirement are perhaps the best examples. Without delving into the policy reasons behind these

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relationship of employee to employer's attorney was confusing).

[13] *See United States v. Moscony*, 927 F.2d 742, 752 (3d Cir.), *cert. denied*, 501 U.S. 1211 (1991); *Griffith v. Davis*, 161 F.R.D. 687, 694-95 (C.D. Cal. 1995). *See generally* Restatement § 121.

[14] Mrs. Clinton bases her argument in part on the confidentiality obligations of attorneys licensed in the District of Columbia. *See D.C. Rules of Professional Conduct* Rule 1.6 (1996). The commentary to that very rule, however, states that it is not intended to govern the scope of the attorney-client privilege, *see id.* cmt. 5, and we have previously held that ethical rules do not alter the privilege. *See United States v. Sindel*, 53 F.3d 874, 877 (8th Cir. 1995).

exceptional legal doctrines, we are satisfied that there is no compelling reason that a reasonable-mistake-of-law rule should apply in the realm of privileges. *See Trammel*, 445 U.S. at 53 (overruling earlier case that had upheld privilege against adverse spousal testimony and affirming defendant's conviction, despite possible reliance on prior law).

D.

For the reasons stated, we conclude that the White House may not use the attorney-client privilege to avoid complying with the subpoena issued in this case by a federal grand jury calling for the notes in question of Ms. Nemetz and Ms. Sherburne.

IV.

The District Court held that the work product doctrine also applied in this case to protect the White House attorneys' notes from disclosure. We disagree.

The work product doctrine sharply limits the access of an opponent to materials "prepared in anticipation of litigation or for trial." Fed. R. Civ. P. 26(b)(3); *see also Hickman v. Taylor*, 329 U.S. 495, 511 (1947) ("materials obtained or prepared by an adversary's counsel with an eye toward litigation"); Restatement § 136(1) (material "prepared by a lawyer for litigation then in progress or in reasonable anticipation of future litigation"). The White House's claim of work product immunity founders on the "anticipation of litigation" requirement of the doctrine.

Courts have applied work product immunity in a variety of legal contexts. *See Hickman*, 329 U.S. at 513-14 (civil case); *United States v. Nobles*, 422 U.S. 225, 238 (1975) (criminal case); *In re Grand Jury Proceedings (Duffy)*, 473 F.2d 840, 846-47 (8th Cir. 1973) (grand jury investigation). The essential element of each case, however, is that the attorney was preparing for or anticipating some sort of adversarial

proceeding involving his or her client.[15] The White House's argument that its lawyers were preparing for the OIC's investigation is simply unpersuasive; as we have stated previously, the OIC is not investigating the White House, nor could it do so. White House officials may be under investigation on account of their individual acts, but we know of no authority allowing a client such as the White House to claim work product immunity for materials merely because they were prepared while some other person, such as Mrs. Clinton, was anticipating litigation.[16] *Cf. In re California Pub. Utils. Comm'n*, 892 F.2d 778, 781 (9th Cir. 1989) (concluding that non-party to litigation may not assert work product doctrine).

As a fall-back position, the White House suggests that anticipated congressional hearings will suffice as well as anticipated litigation. The Restatement seems to agree with the White House. *See* Restatement § 136 cmt. h (stating that litigation "includes a proceeding such as a grand jury or a coroner's inquiry or an investigative legislative hearing"). Neither the White House, Mrs. Clinton, nor the Restatement cites any authority for this proposition, however, and we have discovered none. *Cf. P. & B. Marina, L.P. v. Logrande*, 136 F.R.D. 50, 58-59 (E.D.N.Y. 1991) (finding letters from lobbyist to client not protected work product), *aff'd*, 983 F.2d 1047 (2d Cir. 1992) (table). Even if it could be said that the White House anticipated a congressional investigation of the White

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[15] Work product immunity may be asserted by either the client or the attorney. *See, e.g., In re Sealed Case*, 676 F.2d 793, 809 & n.56 (D.C. Cir. 1982).

[16] Even if there is a common-interest work product doctrine, *see United States v. American Tel. & Tel. Co.*, 642 F.2d 1285, 1299-1300 (D.C. Cir. 1980), our earlier holding that the White House and Mrs. Clinton share no relevant common interest makes the doctrine inapplicable here.

House itself, rather than merely of individuals who work at the White House, and even if we consider a congressional investigation to be an adversarial proceeding, the only harm that could come to the White House as a result of such an investigation is political harm. As in our discussion of the common-interest doctrine, we decline to endorse the position of the White House where it is based on nothing more than political concerns.

The White House bears the burden of establishing the elements of work product immunity. *See* Restatement § 139(2). Based on the showing the White House has made here, we cannot conclude that the work product of its attorneys may be kept from the OIC.

V.

At oral argument, we raised sua sponte the possibility that we could decide the questions of law presented in this appeal without necessarily applying them to this case. After further consideration, we have concluded that our decision must be applied to the parties now before us.

In *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993), the Supreme Court settled one major question of the retroactivity of decisions:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule. . . . In both civil and criminal cases, we can scarcely permit 'the substantive law to shift and spring' according to 'the particular equities of individual parties' claims' of actual reliance on an old rule and of harm from a retroactive application of the new rule.

Id. at 97 (citation and alterations omitted); *see also Griffith v. Kentucky*, 479 U.S. 314, 322-23 (1987) (adopting same rule for criminal cases).

The Court's recent decisions have not forced it to contend with the permissibility of "pure prospectivity," that is, the practice of announcing a new rule but applying it neither to the parties involved in the watershed case nor to others similarly situated. The Court has on occasion resorted to purely prospective decisionmaking, *see James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 536 (1991) (opinion of Souter, J.) (citing cases), but language in the Court's recent opinions convinces us that purely prospective adjudication is at least unwise and most likely beyond our power. *See Harper*, 509 U.S. at 97 (citing "'basic norms of constitutional adjudication'" (quoting *Griffith*, 479 U.S. at 322)); *id.* at 106 (Scalia, J., concurring) ("prospective decisionmaking is quite incompatible with the judicial power").

The most relevant precedent also suggests that it is appropriate to apply our decision in this case. In *Trammel*, the Supreme Court considered the well-established common law privilege against adverse spousal testimony. *See Trammel*, 445 U.S. at 43-46 (describing history of privilege). The Court had specifically affirmed the vitality of the privilege in *Hawkins v. United States*, 358 U.S. 74, 77-79 (1958), and the Proposed Rules of Evidence had recommended continuation of the privilege. *See* Proposed Fed. R. Evid. 505(a), 56 F.R.D. at 244. Nevertheless, the district court permitted Trammel's wife to testify against him over his objection, and the court of appeals affirmed his conviction. *See Trammel*, 445 U.S. at 42-43. The Supreme Court, by a unanimous vote, took the privilege away from the defendant-spouse, leaving it to the witness-spouse to decide whether to testify. *See id.* at 53. Despite this clear overruling of its earlier precedent, the Court applied the new rule to Trammel's case and affirmed his conviction. We believe the same treatment is appropriate in this case, which involves no such drastic change in the law; in fact, because this

is a case of first impression, our decision involves no change in the law at all.

In short, a purely prospective decision is little more--perhaps nothing more--than an advisory opinion. We decline to render such an opinion and conclude that our holding necessarily applies to the White House in this case.

VI.

To sum up, we hold that neither the attorney-client privilege nor the attorney work product doctrine is available to the White House in the circumstances of this case. Accordingly, the order of the District Court is reversed, and the case is remanded for the entry of an order granting the OIC's motion to compel.

KOPF, District Judge, dissenting.

I. Introduction

I respectfully dissent. This case involves the institutional capacity of the President of the United States to function with the advice of legal counsel. The clarity of this point is made evident by the subpoena, which demands notes taken by "the Office of Counsel to the President." (Subpoena Rider at 1.) Because of this important fact, I would apply *United States v. Nixon*, 418 U.S. 683 (1974), rather than the position urged by the Independent Counsel (IC). I would not follow *Nixon* for some purposes, and disregard it for others.

Federal Rule of Evidence 501 requires that we decide whether federal common law extends the attorney-client privilege to the White House. The White House possesses an attorney-client privilege under proposed Federal Rule of Evidence 503, sometimes called Supreme Court Standard 503 (Rule 503). Rule 503 accurately states the federal common law regarding the attorney-client privilege, as this court has

consistently stated in the past. The following portion of Rule 503 is pertinent to the dispute here:

> (a) Definitions. As used in this rule:
>
> (1) A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.
>
> (2) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.
>
> (3) A "representative of the lawyer" is one employed to assist the lawyer in the rendition of professional legal services.
>
> (4) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.
>
> (b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself or his representative and his lawyer or his lawyer's representative, or (2) between his lawyer and the lawyer's representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest , or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.

Rule 503, *reprinted in* 56 F.R.D. 183, 235-36 (1972).

I disagree with the IC that the Rule does not mean what it states, and we should act as if did not exist. There is no reason to deny the well-recognized principle that the government, including the White House, is legitimately entitled to the attorney-client privilege (and the work-product doctrine). The White House, no less than a state government or a corporation, is entitled to the privilege in all types of cases, including criminal cases, so that the White House can comply with the law. The privilege advances the public interest by assuring that the White House will receive well-founded, fact-specific legal advice based upon candid responses from White House officials. Accordingly, I disagree with the IC' s position that the White House lacks the attorney-client privilege.

However, the Supreme Court' s decision in *Nixon* persuades me that the White House privilege gives way to a grand jury subpoena duces tecum issued under the direction of the IC *provided* the procedural protections of *Nixon* have been observed. Unlike the IC, I believe *Nixon* overcomes, but does not erase, the privilege. *Nixon* requires us to conclude that the President's general need for confidentiality, expressed here by the attorney-client privilege, is overshadowed by the grand jury's general need for evidence of the truth. Still, *Nixon* does not, as the IC urges and the majority finds, permit us to assume that the White House lacks the privilege in the first instance.

In particular, I would require, as *Nixon* did in the context of a trial subpoena, that before documents are revealed to the grand jury:

> (1) the special prosecutor must make an initial threshold showing before the district court that the documents are: (a) specifically needed; (b) relevant; and (c) admissible;
>
> (2) assuming such a showing has been made, the documents are first delivered to the district judge, who will examine the documents in chambers, to decide if in fact the documents are relevant and admissible, and irrelevant documents will be returned under seal to the White House.

Id. at 700-02, 713-16.

I do not agree that a grand jury subpoena directed at the White House is *more* important than the trial subpoena directed at the White House in *Nixon*. The President's justifiable need for confidentiality is, as *Nixon* recognized, ever present no matter what other governmental interests are asserted by a prosecutor. The public purpose served by a grand jury is no more important than the public purpose served by a criminal trial. Thus, I disagree with the court's failure to require the IC to make the same type of showing on a motion to compel a response to a grand jury subpoena directed at the White House as would be required by *Nixon* for a trial subpoena.

Furthermore, because Mrs. Clinton also has an attorney-client privilege in her personal capacity, her privilege, implemented in this case by the "common interest" part of the rule, should be considered a complete defense to the grand jury subpoena issued to the White House. I have two reasons for this belief: (1) unlike the White House, Mrs. Clinton has various constitutional rights that are implicated by intercepting her privileged communications without warning and then revealing those communications to a prosecutor; and (2) *Nixon* did not attempt to balance the "public interest" against the "individual interest" and thus cannot serve as precedent for the dispute between the IC and Mrs. Clinton in her personal capacity.

Finally, because we should now declare for the first time that *Nixon* overcomes the White House privilege if a proper showing is made, Mrs. Clinton would consult with White House lawyers at her peril in the future. She would be informed from our opinion that such consultations might no longer be protected since the other party to her conversations (the White House and its lawyers) could be obligated to respond to a grand jury subpoena if the prosecutor made the showing required by *Nixon*. Consequently, in the future, and to the extent of a grand jury subpoena, any such communications

could not legally be "intended" by Mrs. Clinton as "confidential" under Rule 503(a)(4) because she would know and understand that her communications could be "disclosed to third persons."

Accordingly, I would affirm the district court's properly cautious decision refusing to enforce the subpoena. Yet I would make it clear that the White House attorney-client privilege gives way to a grand jury subpoena issued under the supervision of the IC if the procedural protections afforded the White House by *Nixon* are satisfied. A detailed explanation of these views is set forth below.

II. The White House

Like any other client, the White House has an attorney-client privilege in all types of cases. The question, and it is a very difficult one, is whether that privilege should prevail in this first-of-a-kind case. Subject to certain procedural protections, fidelity to *Nixon* requires that the White House privilege give way to the limited extent of a subpoena duces tecum issued by a federal grand jury acting at the direction of the IC. We should not, however, act as if the White House lacks the privilege or allow the IC to make an end run around the procedural protections afforded the White House by *Nixon*.

A. The White House and the Attorney-Client Privilege

We must ask two questions when determining whether the White House has an attorney-client privilege: (1) what standard applies and (2) has the White House satisfied that standard?

1. The Common Law and Rule 503

Federal Rule of Evidence 501 provides that "the privilege of a . . . person" or "government" "shall be governed by principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience." It is our task to find the common law of attorney-client privilege.

Promulgated by the Supreme Court in November 1972, Rule 503(a)(1) plainly grants the White House the attorney-client privilege. The rule extends the privilege to "organization[s] or entit[ies], either public or private."

The subpoena was directed to the "White House." Thus, the IC recognized the "White House" as a discrete governmental organization or entity protected by the unambiguous language of Rule 503(a)(1). Consequently, if Rule 503 applies, the White House has the privilege it asserts.

To avoid Rule 503, it is argued that the rule does not apply because (1) Congress did not enact it; (2) it does not apply to criminal cases involving governmental entities; (3) the public interest is not served when a governmental entity asserts the privilege. None of these arguments suggest a valid reason for failing to follow the plain words of the Rule.

a. Rule 503 Reflects the Common Law Despite Congressional Action

Congress did not enact Rule 503 and various other privilege rules. Instead, Congress adopted a general rule (Rule 501) allowing the federal courts to establish privilege in light of the common law. *See Jaffee v. Redmond*, 116 S. Ct 1923, 1927 n.7, 1930 (1996) (citing proposed Rule 504 regarding psychotherapist-patient privilege in support of the Court's adoption, under Rule 501, of such a privilege).

Our precedents correctly state, however, that Rule 503 is "'an accurate definition of the federal common law of attorney-client privilege.'" *In Re Bieter Co.*, 16 F.3d 929, 935 (8th Cir. 1994) (quoting 2 Jack B. Weinstein et al., *Weinstein's Evidence* ¶ 503[02], at 503-17 (1975)) (applying rule and finding the privilege applied to partnership and prevented disclosure of communication between a consultant of partnership and attorney); *United States v. Spector*, 793 F.2d 932, 938 (8th Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987) (stating "courts have relied upon [Rule 503] as an accurate definition of the federal

common law of attorney-client privilege" and affirming order quashing subpoena for taped statements made by client at direction of a lawyer); *Citibank. N.A. v. Andros*, 666 F.2d 1192, 1195 n.6 (8th Cir. 1981) (stating rule is "a source for defining the federal common law of attorney-client privilege" and holding that privilege belonged to trustee of a corporation and could be waived by him).

Other circuits have come to the same conclusion. See, e.g., *Tennenbaum. v. Deloitte & Touche*, 77 F.3d 337, 340 (9th Cir. 1996) (the court would look to Rule 503 since the proposed rule, although not adopted, was a convenient comprehensive guide to existing federal law of privilege) (citations omitted); *United States v. Moscony*, 927 F.2d 742, 751 (3rd Cir.), *cert. denied*, 501 U.S. 1211 (1991) (Supreme Court Standard 503, though not promulgated, is a restatement of the common law of attorney-client privilege applied in the federal courts before the adoption of the federal rules) (citations omitted); *United States v. (Under Seal)*, 748 F.2d 871, 874 n. 5 (4th Cir. 1984) (Rule 503 provides a comprehensive guide to the federal common law of attorney-client privilege) (citations omitted).

Importantly, the Supreme Court proposed the Rule. This court, and others, frequently refers to the Rule as "Supreme Court Standard 503." *See, e.g., In Re Bieter Co.*, 16 F.3d at 935; *United States v. Spector*, 793 F.2d at 938. When searching for the common law, we should not disregard the fact that the Supreme Court approved the Rule.

Distinguished commentators have also reached the same conclusion: "Standard 503 is a restatement of the traditional common law attorney-client privilege that had been applied in the federal courts prior to the adoption of the federal rules. Consequently, despite the failure of Congress to enact a detailed article on privileges, Standard 503 should be referred to by the courts." 2 Jack B. Weinstein et al., *Weinstein's Evidence* ¶ 503[02], at 503-19 (1996) (citing, among other cases, *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 605

n.1 (8th Cir. 1977)) (footnotes omitted). *See also Restatement of the Law (Third) Governing Lawyers* § 124 & Rep.'s n. at 412 (Proposed Official Draft 1996)[1] *available in* WL database "REST-LGOV" (citing Rule 503 (a) (1) as support for the proposition that the "prevailing rule" is that the government has the same privilege as its private counterparts).

Therefore, the failure of Congress to adopt Rule 503 is not significant. The Rule is an accurate definition of the federal common law of attorney-client privilege despite the lack of Congressional approval.

b. Rule 503 Makes No Distinction for Criminal Cases

Contrary to the second argument for not applying it, the plain words of Rule 503 make no distinction for criminal cases. I find no reason to make an exception for special prosecutors who have a dispute with the White House. To the extent it is suggested that the privilege has never

been extended to a federal governmental entity in a criminal case brought by another federal governmental entity, the point is meaningless. The reason there are no such cases is obvious: intra-governmental disputes in the federal criminal arena seldom arise, regardless of whether the attorney-client privilege is involved.

Further, there is certainly no case which denies the privilege in matters such as this. In fact, the only remotely relevant federal case implicitly acknowledged the existence of the privilege for a state governmental entity in a federal criminal investigation. *In Re Grand Jury Subpoena*, 886 F.2d 135, 137-38 (6th Cir. 1989) ("city council" was a "client" for the purpose of attorney-client privilege when a federal grand

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[1] This draft received tentative approval in May, 1996. *American Law Institute Nears Finish Line on Lawyer Ethics, Product Liability Projects*, 64 U.S.L.W. 2739 (May 28, 1996).

jury sought documents from the City of Detroit and the city asserted the privilege).

Most importantly, there is no reason to pretend the privilege does not exist simply because the White House asserts it during a criminal investigation. As will be discussed in more detail later, *Nixon* did not take this approach. Rather, as the *Nixon* court made clear, the appropriate approach is to balance the governmental privilege asserted by the White House (whether it be the attorney-client privilege or some other privilege) against the competing governmental interest asserted by the IC, the ultimate goal being to promote the "public interest." 418 U.S. at 707-13.

Consequently, I reject the argument that it is proper to ignore the attorney-client privilege because the IC has the power to attach the label "criminal" to this dispute.

c. A White House Privilege Promotes the Public Interest

Recognition of the privilege for governmental entities, particularly the White House, advances the public interest.

Since Rule 503 was proposed, the federal courts have consistently recognized that governmental entities have the attorney-client privilege. *See, e.g., Mead Data Cent., Inc. v. United States Dep't of Air Force*, 566 F.2d 242, 252-53 & n.20 (D.C. Cir. 1977) (recognizing privilege in Freedom Of Information Act (FOIA) case and stating that in other contexts "there are decisions which have applied [the privilege] to deny a discovery request directed toward a government") (citations omitted); *Jupiter Painting Contracting Co. v. United States*, 87 F.R.D. 593, 598 & n.6 (E.D. Pa. 1980) (recognizing privilege in a suit for a tax refund and stating that "[c]ourts generally have accepted that attorney-client privilege applies in governmental context") (collecting federal cases dating from and after 1963) (citations omitted).

While it is true that none of these cases dealt with the precise issue in this case, one cannot ignore the fact that the

courts have consistently held that the public interest is furthered by extending the privilege to governmental entities. As a result, we should be very skeptical of the IC's argument that requires us to ignore a general principle.

Since at least 1965, Congress has affirmatively recognized the government's need to be protected by the attorney-client privilege regarding the production of documents. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 136, 154 (1975) (applying 5 U.S.C. § 552 (b) (5)) (FOIA case). The Court observed that the legislative history, authored in 1965, declared the exemption "'would include . . .documents which would come within the attorney-client privilege if applied to private parties.'" *Id.* (quoting S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965)). Consequently, believing that Congress would find recognition of the privilege to be a surprise is impossible.

The proposed *Restatement of the Law (Third) Governing Lawyers* also recognizes that the attorney-client privilege "extends to a communication of a governmental organization" and to "an individual officer, employee, or other agent of a governmental organization . . . ." *Restatement of the Law (Third) Governing Lawyers* § 124, at 408. This section "*states the generally prevailing rule that governmental agencies and agents enjoy the same privilege as non-governmental counterparts.*" *Id.* cmt. b at 409 & Rep.'s n. at 412-14 (collecting federal and state cases dating from and after 1942) (citations omitted) (emphasis added). The rationale is obvious: "The privilege aids government entities and officers in obtaining legal advice founded on a complete and accurate factual picture. Communications from such agents should be correspondingly privileged." *Id.* at 408. The *Restatement's* reasoned conclusion, coming nearly twenty-five years after the Supreme Court proposed Rule 503, lends added support for the

finding that a governmental attorney-client privilege advances, rather than detracts from, the public interest.[2]

Although the IC now holds the opposite view, the United States has previously and consistently taken the position that governmental entities, particularly the President and his advisers, are protected by the attorney-client privilege. One prior expression of the views of the United States regarding the attorney-client privilege, the President, and his advisers is particularly thoughtful.

In a 1982 opinion issued to the Attorney General of the United States, Assistant Attorney General Theodore B. Olson, of the Office of Legal Counsel (OLC), advised the Attorney General that "[a]lthough the attorney-client privilege traditionally has been recognized in the context of private attorney-client relationships, the privilege also functions to protect communications between government attorneys and client agencies or departments, as evidenced by its inclusion in the FOIA, much as it operates to protect attorney-client communications in the private sector." *Memorandum for the Attorney General re: Confidentiality of the Attorney General's Communications in Counseling the President*, 6 Op. Off. Legal Counsel 481, 495 (1982) (citations omitted), reprinted in Appellee's App. [hereinafter *Att'y Gen.'s Mem.*].

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[2] Even those commentators who question whether the attorney-client privilege was extended to governments at "common law" agree "most" courts have recognized that governmental entities are entitled to the privilege. 24 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure*, § 5475, at 125 (1986). These commentators likewise predict the courts will continue to recognize that the privilege extends to governmental entities. *Id.* at 128. ("[I]t seems likely that some form of privilege for governmental clients will be recognized by federal courts applying Rule 501.") (citations omitted.)

OLC found convincing support for its position in *Upjohn Co. v. United States*, 449 U.S. 383, 389-97 (1981) (applying attorney-client privilege in corporate context, rejecting "control group test," and holding that detailed information provided to corporate counsel by corporate managers, who were not necessarily policy makers, regarding questionable payments by corporation was protected from an IRS document summons under the attorney-client privilege[3]). *Att'y Gen.'s Mem.* at 495-96.

According to OLC, the President, no less than the Upjohn corporation, required the attorney-client privilege so he could comply with the law by insuring that subordinates talked candidly with counsel. *Id.* OLC reasoned:

> [I]t is likely that, in most instances, the 'client' in the context of communications between the President and the Attorney General, and their respective aides, would include the broad scope of White House Advisers in the Office of the President. The 'functional' analysis suggested by *Upjohn* focuses on whether the privilege would encourage the communication of relevant and helpful information from advisors most familiar with the matters on which legal assistance is sought, as well as whether the privilege is necessary to protect and encourage the communication of frank and candid advice to those responsible for executing the recommended courses of action.

Id. at 496.

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[3] In addition, the Court held that to the extent they reflected the mental impressions of counsel, the documents were also protected from disclosure by the "work product" doctrine. *Id.* at 401-02. To the extent the notes in this case are "work product," they too would be protected under the "work product" doctrine of *Upjohn*.

If this court has to make a choice when discovering the common law as applied to the White House, we ought to choose the analysis contained in the *Memorandum for the Attorney General*. I am particularly opposed to the adoption of the position urged by the IC because it is contrary to the long-standing policy of the Department of Justice.

To avoid *Upjohn*, it is argued that the White House is different from a corporation in three distinguishing respects. It is argued that the White House cannot be prosecuted for a crime. The IC also argues that White House lawyers, unlike counsel for corporations, have a statutory responsibility to report crimes. Finally, it is claimed that the White House, as opposed to a corporation, has a duty to further honest government.

Since the *Upjohn* decision was not based upon the fact that a corporation could be prosecuted for a crime, it is an irrelevancy to distinguish *Upjohn* on that basis. In *Upjohn*, the government pursued the exact opposite of the IC's argument here that the privilege does not apply because the White House cannot be prosecuted for a crime. In *Upjohn* the government argued that because corporations were subject to criminal liability corporations had a sufficient incentive to comply with the law and, therefore, corporations did not need the attorney-client privilege because they would seek legal advice in any event. The Court rejected this argument in a footnote. 449 U.S. at 393 n.2. Simply put, *Upjohn* did not turn on the presence or absence of criminal liability. *Id.*

More to the point, *Upjohn* reasoned that corporate policy makers legitimately need their lawyers to know the facts in order for the corporation to comply with the law, and, absent the corporate attorney-client privilege, the fact-finding process would be impaired along with the corporation's ability to conform its conduct to the law after receiving fact-based legal advice. *Id.* at 389-97. Likewise, the Court reasoned that even minor corporate employees needed candid legal advice to

insure that the corporation complied with the law, and absent the privilege such advice would not likely be forthcoming. *Id.* The same reasoning applies to the White House.

I also reject the related argument that we can distinguish *Upjohn* on the basis that a White House official who fears he or she may have violated the criminal law should speak to a private attorney, not a government lawyer. This argument misses the point for extending the privilege to organizations.

The organizational attorney-client privilege, be it asserted by the White House or Upjohn, is intended to encourage officials, who may be fearful of losing their jobs, their reputations, their privacy, or their liberty, to tell the organization the raw truth so it can comply with the law. The privilege is also premised upon the reasonable belief that no-nonsense legal advice generally depends upon confidentiality, and corporations need such advice if they are to comply with the law. In this regard, there is no reason to presume that the White House is different from Upjohn.

The argument that government lawyers, unlike corporate counsel, are required by statute to report crimes and this fact distinguishes White House counsel from corporate counsel, is built upon a false premise. While it is true that 28 U.S.C. § 535(b) requires governmental employees to report crimes, the Department of Justice has properly reasoned that the statute must be interpreted in conformity with, not in opposition to, the attorney-client privilege. Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, *Memorandum for the Deputy Attorney General re: Disclosure of Confidential Information Received by U.S. Attorney in the Course of Representing a Federal Employee* at 2 (Nov. 30, 1976) ("[N]o information the employee conveyed to the Assistant U.S. Attorney in connection with the civil action may be used by the Department to prosecute the employee; nor may it be turned over to anyone else, such as the employing agency, for use against him."), *reprinted in* Appellee's App. Assistant Attorney General Scalia

stated: "Given the absence of any discussion of the subject in the legislative history [regarding section 535(b)], it would in our view be inappropriate to infer a congressional purpose to breach the *universally recognized and longstanding confidentiality of the attorney-client privilege.*" *Id.* at 6-7 (emphasis added).

The Department of Justice has consistently followed this advice. For example, in 1985 OLC stated that the "principal reason for our conclusion that the attorney-client privilege overrides § 535(b) is that confidentiality of communications between client and lawyer is essential if Department attorneys are to be able to provide adequate legal representation." Ralph W. Tarr, Acting Assistant Attorney General, Office of Legal Counsel, *Duty of Government Lawyers Upon Receipt of Incriminating Information in the Course of an Attorney-Client Relationship With Another Government Employee* at 6 (March 29, 1985) (citing prior opinions of OLC dating from 1978), *reprinted in* Appellee's App.

Lastly, the argument is advanced that the White House, but not a corporation, has a public duty to seek honest government. Therefore, it is argued, the attorney-client privilege should be ignored because it impedes an honest government's search for the truth. The "good government" argument is no basis for denying the privilege to the White House.

To recognize that the White House has an attorney-client privilege is not to adopt a "bad government" position though the existence of such a privilege may inhibit the IC from obtaining all the information he might like by making a demand upon the White House. As *Upjohn* recognized, the attorney-client privilege serves the public interest by promoting the "valuable efforts of corporate counsel to ensure their client's compliance with the law," especially in those areas of the law that are "hardly . . . instinctive." 449 U.S. at 392. The same thing can be said for the White House, *especially* because it has a duty to promote honest government. We should not premise

our decision upon the assumption that the IC is the *only* guardian of just government.

In short, I reject the argument that the attorney-client privilege in the hands of the White House is antithetical to the interests of justice, though I acknowledge that the privilege may impede the work of the IC. When a prosecutor asks the court for help in invading the confidences of the President, the proper way to address the "public interest" question is not to pretend that the White House lacks the attorney-client privilege. On the contrary, the court should carefully balance, as *Nixon* did, the competing governmental interests, subject to the procedural protections that *Nixon* carefully set forth.

e. Summary

Rule 503 is an accurate statement of the common law. The rule is therefore definitive, and we should apply it.

2. Application of Rule 503

Having determined that Rule 503 is definitive and that the governmental attorney-client privilege set forth in Rule 503 generally promotes the public interest when applied to the White House, we should apply the rule to this case. The White House possesses the attorney-client privilege because all the prerequisites for application of Rule 503(b)(1) have been established.

a. White House As "Client" and Mrs. Clinton As "Representative"

Under Rule 503(a)(1), as applied to the evidence here, there is a "client." The "client" is the White House, acting through Mrs. Clinton in her representative role as First Lady. As noted earlier, Rule 503 explicitly extends the attorney-client privilege to "organizations" or "entities" that are "public" in nature. The rule also explicitly protects communications involving a "representative" of a client. Rule 503(b)(1)

protects a "client's" discussions "between himself or his representative and his lawyer."

Mrs. Clinton is surely a "representative" of the White House. To the extent the IC argues that Mrs. Clinton as First Lady should not be considered a "representative" of the White House, I reject the argument as factually and legally unsound.

Factually, the district court found that Mrs. Clinton, "like other First Ladies before her, has a widely recognized role as an advisor to the President and is generally considered to be a member of the President's inner circle." Slip. Op. at 10. The district court's finding is not clearly wrong.

Legally, "*Congress* itself *has* recognized that the President's spouse acts as the functional equivalent of an assistant to the President." *Association of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 904 (D.C. Cir. 1993) (holding Mrs. Clinton was a "full-time officer or employee of federal government," relying on and quoting 3 U.S.C. § 105(e) (emphasis in original)). See also, *Att'y Gen.'s Mem.*, 6 Op. Off. Legal Counsel at 496 (attorney-client privilege covers the "broad scope of White House advisers in the office of the President").

As a "member of the President's inner circle" of advisers, Mrs. Clinton is precisely the type of organizational "representative" the attorney-client privilege would ordinarily cover. *See, e.g., Upjohn Co. v. United States*, 449 U.S. at 387-95; *In Re Bieter Co.*, 16 F.3d at 935-40 (granting a writ of mandamus and sustaining invocation of attorney-client privilege by partnership; applying *Upjohn* to a person who, although not an employee of the partnership, was a consultant; reaching this result because: (1) communications were made for the purpose of seeking legal advice; (2) it was reasonable to assume that client's principal directed consultant's communication with counsel; (3) it was reasonable to assume that client's principal directed the communication be made for the purpose of securing legal advice; (4) subject matter of

discussion was within scope of the consultant's duties as evidenced by what consultant did; and (5) communications were held in confidence).

b. To Or From A Lawyer

It is undisputed that there were communications to or from White House counsel to or from the First Lady. *See* Rule 503 (a) (2) & (b) (1). *Upjohn* makes clear that the privilege goes both ways, that is, the privilege protects advice from a lawyer to a client, and it also protects statements made by a client to a lawyer for the purpose of informing the lawyer so the lawyer may give fact-specific advice to the client. 449 U.S. at 389-91. Thus, communications from the First Lady to White House counsel are protected just the same as communications to the First Lady from White House counsel.

c. Confidential Communication

Given the undisputed facts presented in the declaration of White House counsel, (IC App. at 27 ¶ 16, 29-30 ¶¶ 20-21), as well as the facts presented in the declaration of Mrs. Clinton's personal lawyer, (IC App. at 35-37 ¶¶ 5-7), the communications recorded in the sought-after notes were intended to be "confidential" within the meaning of Rule 503 (a) (4). These communications were not intended to be revealed to third parties, and they were not. Furthermore, recognizing (1) the explicit language of Rule 503, (2) the wide acceptance of a governmental attorney-client privilege by the federal courts, thoughtful commentators and the Department of Justice, (3) the Supreme Court's opinion in *Upjohn*, and (4) the fact that *Nixon* did not rule on a White House assertion of the attorney-client privilege, there was no reason for the White House, Mrs. Clinton, or the lawyers to doubt that the communications would be held in confidence.

The presence of Mrs. Clinton's personal lawyer does not change the result. As will be discussed more fully later, Mrs. Clinton, in her personal capacity, and the White House, as an

entity represented by the First Lady in her official capacity, shared a legal "matter of common interest." Rule 503(b)(3) prevents disclosure of communications "by [a client] or his lawyer to a lawyer representing another in a matter of common interest."

Among other things, both parties (the White House and Mrs. Clinton personally) needed to respond carefully and candidly to the IC; therefore, both required the advice of legal counsel. As a result, Rule 503 (b) (3) explicitly protects communications between White House counsel and the First Lady even though a lawyer (Mrs. Clinton's personal lawyer) for another party (Mrs. Clinton in her personal capacity) was present.

d. Facilitating the Rendition of Legal Services

Finally, the undisputed evidence establishes that the communications were made for the purpose of "facilitating the rendition of professional legal services" to the White House as the "client" within the meaning of Rule 503(b)(1).

The subject of the meeting that generated the first set of notes pertained to the death of a senior White House official (Vincent W. Foster) and Mrs. Clinton's activities immediately afterward. (IC App. at 27 ¶ 16.) The subject of the meeting that generated the second set of notes was the discovery of billing records involving Mrs. Clinton which were found at the White House and turned over to the IC as relevant evidence in his investigation. (IC App. at 28-30 ¶¶ 18-21, 35-37 ¶¶ 5-7.)

Both meetings, and the notes regarding them, pertained to events that directly involved the institutional functioning of the White House. It is reasonable to believe that White House counsel and Mrs. Clinton discussed her role as First Lady after the death of Mr. Foster and her role as First Lady regarding the discovery of the billing records. Moreover, the events that were the subject of these meetings between the First Lady and White House counsel are directly related to issues the IC was

authorized to investigate concerning the White House as an institution. Slip Op. at 2-3. (IC authorized to investigate death of former Deputy White House Counsel Vincent W. Foster and discovery of Rose Law Firm billing records in the White House residence.)

Under these circumstances, it is reasonable to assume that the President (or another principal at the White House) directed the First Lady's communication with White House counsel for the purpose of securing legal advice for the White House. *In Re Bieter Co.*, 16 F.3d at 938-39 (making similar assumptions in context of a partnership consultant).

Ignoring for the moment Mrs. Clinton's personal stake in the matter, the White House as a "client" had a legitimate and independent institutional reason to pursue the two conferences between its "representative" (Mrs. Clinton) and its "lawyers" (White House counsel) for the "purpose of facilitating the rendition of professional legal services to the client [the White House]." Rule 503 (b) (1). White House lawyers had a legitimate institutional need to know what the client's "representative" knew in order to advise the "client," including the client's "representative," what to do or not do. In particular, the White House had a legitimate institutional need for the advice of its lawyers so that, acting through people, including the First Lady, as it must, the White House could carefully and candidly respond to the IC.

The decision to turn over billing records to the IC, records that although discovered at the White House also involved Mrs. Clinton in her personal capacity, is proof of the White House's legitimate institutional need to have its lawyers advise and consult with the "client's representatives," including individuals such as the First Lady. On January 4, 1996, Jane C. Sherburne, special counsel to the President, learned that Ms. Carolyn Huber, a White House employee, had located in the White House residence a copy of billing records relating to the work performed by attorneys at the Rose Law firm, including

Mrs. Clinton, for Madison Guaranty. (IC App. at 28 ¶ 18.) Ms. Sherburne, in consultation with Mrs. Clinton's personal lawyer, decided that the records should be promptly turned over to the IC, the Senate Whitewater Committee, the House Banking Committee, the FDIC and the RTC, and the records were in fact turned over to those governmental bodies. (*Id.*) The production of these documents caused the IC, among others, to launch an investigation relating to the finding of the billing records. (*Id.*)

As the Supreme Court has recognized, the attorney-client privilege is extended to organizations so the people who ultimately effect the policy of an organization can comply with the law by obtaining information from subordinates and then directing those subordinates to comply with the law. *Upjohn*, 449 U.S. at 390-93. The handling of the billing records here proves why the *Upjohn* rationale for extending the attorney-client privilege to corporations, acting as they must through people, is also applicable to the White House.

e. Summary

There was (1) a communication to or from Mrs. Clinton in her role as an "inner-circle" representative of the client White House, Rule 503(a)(1) & (b)(1); (2) to or from a White House lawyer, Rule 503(a)(2); (3) intended to be confidential, Rule 503(a)(4); (4) for the purpose of seeking, obtaining, or providing legal assistance to the client White House, Rule 503(a)(4) & (b)(1). These findings establish that the White House has the attorney-client privilege it asserts. *See also In Re Bieter Co.*, 16 F.3d at 935-40.

B. Balancing the Public Interest

Assuming the White House possesses the attorney-client privilege, two issues must be resolved. First, we must decide whether the IC could ever be entitled to the notes when the White House asserts the attorney-client privilege. Second, we must address the issue of what procedural protections must be

employed to protect the White House's legitimate need for confidentiality, assuming the privilege is not an absolute bar and that production may be required under certain circumstances. Both inquiries require a careful balancing of the interests of the White House and the IC to preserve and protect the public interest that both governmental entities seek to promote.

1. *Nixon's* Balancing Test

While the White House generally has the attorney-client privilege it asserts here, this case is unprecedented. Never have the courts been confronted with (1) a motion by an independent counsel (himself a singularly unique creature under federal law) in a criminal investigation (2) to enforce a grand jury subpoena for documents directed at the White House (3) under circumstances where enforcement of the subpoena would pierce the attorney-client privilege enjoyed by the White House.

Once we decide that the White House has a privilege that the IC seeks to overcome, the only precedent that matters is *United States v. Nixon*, 418 U.S. 683. A brief summary of that case is helpful.

The *Nixon* court held that the public interest requires that presidential confidentiality be afforded the greatest possible protection consistent with the fair administration of justice. Nevertheless, the Court also held that the President was required to turn over taped conversations to the district court pursuant to a trial subpoena issued at the request of a special prosecutor under Federal Rule of Criminal Procedure 17(c), despite the President's assertion of Executive Privilege.

The special prosecutor had made a preliminary showing of specific need, relevance, and admissibility before a federal district judge. The Supreme Court suggested that such a showing was always required when the President invoked a privilege.

The Court then attempted to balance the twin concepts of "public interest" asserted by the President and the special prosecutor. The Court stated that "when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice." *Id.* at 713.

As an additional precaution, the Court required the district court to conduct an *in camera* examination of the tapes after the order for production was issued, but before they were turned over to a special prosecutor. The purpose of this examination was to decide whether the tapes were actually relevant and admissible.

Now, as in *Nixon*, both the White House and the IC assert that the "public interest," warrants a finding for their particular position. As between these governmental entities, I agree that the "public interest" is the value to be preserved by our ruling. As a result, the dispute comes down to this: Is the White House's attorney-client privilege generally more important than a grand jury's criminal investigation of the White House?

At this elevated level of abstraction, *Nixon* teaches that the President's general need for confidentiality (expressed here by the attorney-client privilege) is outweighed by a grand jury's need for evidence of the truth.[4] The Department of Justice has taken a similar view in the past. *See Att'y Gen.'s Mem.*, 6 Op. Off. Legal Counsel at 487-88 ("The more generalized the executive interest in withholding the disputed information, the more likely it is that the claim of privilege will yield to a specific, articulated need related to the effective performance by the coordinate branches of their constitutionally assigned functions.") (citing *Nixon*).

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[4] The same analysis justifies piercing the work product "privilege."

The White House has not articulated the specific harm to the public interest that would occur if this subpoena was enforced. *Nixon* addressed a similar issue and concluded that "[a]bsent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications of such material is significantly diminished by production of such material for *in camera* inspection with all the protection that a district court will be obliged to provide." *Id.* at 706. Therefore, I would find that, assuming the procedural protections afforded the White House by *Nixon* are observed, the attorney-client privilege may be invaded.[5]

This is not a conclusion to be reached lightly. The White House has a strong argument that an attorney-client privilege which is not absolute is no privilege at all. *Upjohn*, 449 U.S. at 393. Moreover, as discussed in more detail later, *Nixon* specifically recognized that the attorney-client privilege was an exception to the general rule that "the public . . . has a right to every man's evidence." 418 U.S. at 709-10.

Nevertheless, *Nixon* ultimately teaches that the number of times the President's confidences may be invaded will be few. The only time such confidences may be probed is when the procedural protections carefully articulated by *Nixon* have been satisfied. Accordingly, the attorney-client privilege, while not absolute, will retain vigor for the White House because the privilege will be overcome only infrequently and only after painstaking judicial scrutiny.

2. *Nixon's* Procedural Protections

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[5] However, as did the Supreme Court in *Nixon*, I would limit the holding to criminal investigations involving special prosecutors (and not to civil cases or congressional hearings). *Nixon*, 418 U.S. at 712 n.19.

The White House suggests the IC is on a "fishing trip." After all, the IC could simply call Mrs. Clinton to testify before the grand jury, as he has done in the past, to investigate her knowledge of the facts. Consequently, it is reasonable to ask: why does the IC need the privileged notes?

We ought to be very cautious about assuming that the IC needs to invade the White House attorney-client privilege to obtain the facts. *Upjohn* forcefully made this point:

> Here the government was free to question the employees who communicated with Thomas [corporate counsel] and outside counsel. . . . While it would probably be more convenient for the government to secure the results . . . by simply subpoenaing the . . . notes taken by petitioner's attorneys, such considerations of convenience do not overcome the policies served by the attorney-client privilege.

449 U.S. at 396.

If we require a preliminary showing of specific need, relevance, and admissibility to a district judge as *Nixon* clearly did, 418 U.S. at 700-02, 713-14, such a requirement would (1) prevent the use of a grand jury subpoena as part of an improper "fishing expedition" and (2) insure that the White House attorney-client privilege was not lightly overturned. Fidelity to *Nixon* requires that we approve the invasion of the White House attorney-client privilege when absolutely necessary, but fidelity to *Nixon* also requires that we extend to the White House the protections that *Nixon* set forth before such an invasion takes place.

To avoid the preliminary showing requirement, the IC makes much of the fact that *Nixon* involved a trial subpoena and this case does not. The IC further points out that the preliminary showing requirement of *Nixon* was (in part) based upon Fed. R. Crim. P. 17(c) which deals with trial subpoenas. Two responses make the IC's arguments unpersuasive.

Initially, *Nixon* repeatedly cautions that the unique interests of the Presidency, not merely Rule 17(c), warrant active judicial supervision with a threshold showing of need, relevance, and admissibility. *Id.* at 702, 713-16. Quite apart from Rule 17(c), early precedent required a showing that "the Presidential material was 'essential to the justice of the [pending criminal] case.'" *Id.* at 713 (quoting *United States v. Burr*, 25 F. Cas. 187, 192 (C.C. Va. 1807) (No. 14,694)) (brackets in *Nixon*).

Moreover, I am unconvinced by the logic of the IC's argument. I do not believe a grand jury subpoena is *more* important than a criminal trial subpoena such that the procedures required by Nixon should be cast aside when the IC decides to cause the issuance of grand jury subpoena aimed at the White House.

Given the difference between a grand jury proceeding and a trial, the need, relevance and admissibility standard would be judged considering the nature of the proceeding. For example, treating impeachment evidence more liberally might be appropriate. *Compare Nixon*, 418 U.S. at 701. *Nixon* left these issues to the "sound discretion of the trial court since the necessity for the subpoena most often turns upon a determination of factual issues." *Id.* at 702. Nevertheless, the investigative nature of a grand jury is no reason for the wholesale disregard of the protections that *Nixon* affords the unique status of the Presidency.

Even a favorable ruling for the IC at the first stage of the proceedings would not mean that the IC would ever see the notes. Assuming that a threshold showing had been made, *Nixon* required that the notes be delivered to the district court, not to the special prosecutor. *Nixon*, 418 U.S. at 713-16. After that, the district court was required to make an *in camera* examination of the notes. *Id.*

With the notes before it,[6] the court would (1) determine whether the notes were relevant and admissible; (2) ensure that they were treated with the sensitivity any Presidential papers command; and (3) require that the irrelevant portions of the notes (if any) be promptly returned to the White House under seal. *Id.* The White House is entitled to similar protections when served with a grand jury subpoena that invades the attorney-client privilege, and I disagree with the refusal to extend such protection to the White House.

3. Threshold Showing

The White House contends the IC has not made a sufficient initial showing of specific need, relevance, and admissibility. The district court did not reach this issue. The IC does not argue that he satisfied *Nixon*. He assumes that he was not required to make such a showing. He does not brief the question of whether he made a sufficient showing. Accordingly, we need not decide for the first time on appeal whether the IC accidentally made the required showing.

III. Mrs. Clinton

Mrs. Clinton has an attorney-client privilege that protects against disclosure of the notes. However, as noted earlier, this court should also rule *for the first time* that the White House privilege must give way to a grand jury subpoena issued under the supervision of an independent counsel *if* the procedural protections of *Nixon* are satisfied. Consequently, once Mrs. Clinton has been advised by virtue of our opinion that she can no longer reasonably believe her conversations with White House counsel will be held in confidence in every circumstance, consistent with Rule 503(a) (4) Mrs. Clinton will

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[6] Although the district court could seek the help of the IC and White House counsel, it could not make a disclosure until the proper examination had been completed. *Id.* at 715 n.21.

consult with White House counsel in the future at the risk of having her communications disclosed to the grand jury.

A. Mrs. Clinton and the Attorney-Client Privilege

The IC has conceded that in her personal capacity Mrs. Clinton is entitled to the protections of the attorney-client privilege regarding discussions with her private lawyers. Slip. Op. at 12 n.5. The IC can take no other position. Rule 503(a)(1)&(b)(1).

The IC appears to argue that *Nixon* applies to Mrs. Clinton in her personal capacity. Alternatively, the IC argues that even if *Nixon* does not apply to Mrs. Clinton, she lost her personal privilege by sharing her thoughts with White House lawyers. I disagree on both counts.

1. *Nixon* Does Not Apply to Mrs. Clinton

Although it is unclear, the IC may argue not only that *Nixon* overcomes the White House privilege, but also that it justifies disallowing Mrs. Clinton's personal attorney-client privilege to the extent that there were communications shared with White House counsel. If this is the IC's contention, I am not persuaded.

Nixon specifically recognized that the attorney-client privilege was an exception to the general rule that "the public . . . has a right to every man's evidence," stating:

> [T]he Fifth Amendment to the Constitution provides that no man "shall be compelled in any criminal case to be a witness against himself." And, generally, an attorney . . . may not be required to disclose what has been revealed in professional confidence. These and other interests are recognized in law by privileges against forced disclosure, established in the Constitution, by statute, or at common law.

Id. at 709-10.

Despite *Nixon's* recognition of the transcendent value of the attorney-client privilege, it is a reasonable extension of *Nixon* to pierce the organizational attorney-client privilege asserted by the White House. Such an extension is appropriate because the *Nixon* opinion instructs that generalized governmental confidentiality privileges are on balance less important than the government's search for the truth when both governmental interests are compared with the "public interest."

It is quite a different thing to retroactively deny the protection of the attorney-client privilege to an individual like Mrs. Clinton based on the "public interest." This distinction is important because the Fifth and Sixth Amendments protect Mrs. Clinton, unlike the White House, and a violation of her attorney-client privilege may also violate her constitutional rights. *See, e.g., O'Brien v. United States*, 386 U.S. 345 (1967) (although they were not revealed to prosecutors, governmental interception of conversations between a defendant and his lawyer required vacation of conviction) (relying upon *Black v. United States*, 385 U.S. 26 (1966)). *Cf. Weatherford v. Bursey*, 429 U.S. 545, 557 (1977) (explaining and distinguishing *O'Brien* and *Black* and stating "[t]his is not a situation where the State's purpose was to learn what it could about the defendant's defense plans" by intruding "on the lawyer-client relationship . . .").

In addition, and more significantly, the dispute between the White House and the IC solely involves the "public interest," while the dispute between the IC and Mrs. Clinton pits the "public interest" against "individual liberties," constitutional and otherwise. *Nixon* did not attempt to balance "public" and "individual" interests, and we thus lack any meaningful guidance on the matter.

Given the Supreme Court's historic respect for the attorney-client privilege[7] and the *Nixon* opinion's recognition that the attorney-client privilege normally trumps the rule that "the public . . . has a right to every man's evidence," we should not expand *Nixon* beyond disputes between governmental entities such as the White House and the IC.

2. The "Common Interest" Provision Protects Mrs. Clinton

To avoid the difficulty of applying *Nixon* to Mrs. Clinton, the IC alternatively argues that even if the communications evidenced by the notes are "confidential" within the meaning of Rule 503(a)(4), Mrs. Clinton and her personal lawyers shared their thoughts with White House lawyers, and Mrs. Clinton lost her personal privilege as a result. I disagree.

The rule protects otherwise "confidential" communications made by the "[client] or his lawyer to a lawyer representing another in a matter of common interest." Rule 503(b)(3). The "common interest" provision of Rule 503 "is in accord with previous federal practice in recognizing a privilege both for inter-attorney communications and joint conferences where the client communicates to the other attorney directly." 2 Jack B. Weinstein et al., *Weinstein's Evidence* ¶ 503[06], at 503-99 (footnote omitted). *Accord John Morrell & Co. v. Local Union 304A*, 913 F.2d 544, 555-56 (8th Cir. 1990) (recognizing and sustaining "joint defense" privilege as to an internal

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[7] *See, e.g., Upjohn*, 449 U.S. at 389 (stating "[t]he attorney--client privilege is the oldest of the privileges for confidential communications known to the common law"); *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (stating the privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure").

memorandum written by corporate general counsel that was shared with codefendants in another case), *cert. denied*, 500 U.S. 905 (1991) (citations omitted). *See also United States v. American Tel. & Tel. Co.*, 642 F.2d 1285, 1300 (D.C. Cir. 1980) (since "MCI shares common interests with the United States," MCI did not waive the work product privilege by sharing documents with the government).

The rule applies "not only if litigation is current or imminent but, consistently with the rest of the Standard, whenever the communication was made in order to facilitate the rendition of legal services to each of the clients involved in the conference." 2 Jack B. Weinstein et al., *Weinstein's Evidence* ¶ 503[06], at 503-99 (footnote omitted). Drafters of the "common interest" provision of the rule "intended the privilege to be broadly construed in multi-party situations." *Id.* at 503-100 (footnote omitted).

The evidence and the findings of the district court establish that there were two "clients," the White House, represented by Mrs. Clinton in her role as First Lady, and Mrs. Clinton personally; each "client" was in turn represented by separate lawyers regarding matters of "common interest." Consider again the apparent joint decision of the White House and Mrs. Clinton to turn over to the IC the billing records found at the White House. As a categorical matter, the "common interest" provision of Rule 503(b)(3) plainly applies to Mrs. Clinton and the White House because both legitimately needed the advice of separate lawyers in order to carefully and candidly respond to the IC, among others.

The IC argues that the White House does not have the attorney-client privilege, or that if it does, *Nixon* overcomes the privilege and Mrs. Clinton cannot personally claim that the "common interest" rule protects her communications. The IC asserts that Mrs. Clinton loses the protection of the attorney-client privilege once the White House does. This argument fails for two reasons.

As demonstrated earlier, the White House has the attorney-client privilege. Since the White House has always possessed the privilege, the IC cannot properly argue that Mrs. Clinton loses the "common interest" protection because the White House lacked the attorney-client privilege in the first place. The White House had the privilege then and has it now. *Nixon* may overcome, but it does not erase, the White House privilege.

Next, I agree, as indicated earlier, that, by extension of the *Nixon* reasoning, the White House attorney-client privilege must give way under certain very limited circumstances. However, a precedent making extension of *Nixon* to the White House's attorney-client claim does not justify denying Mrs. Clinton the protection of her personal attorney-client privilege safeguarded by the "common interest" provisions of the rule.

The IC has cited no case, nor have I found one, remotely suggesting that a party otherwise protected by the "common interest" provision of the attorney-client privilege loses that protection because a court determines after the fact *for the first time* that the *other party's* attorney-client privilege must, on balance, give way. We have pointedly recognized that it is "*fundamental* that the 'joint defense privilege cannot be waived without the consent of all parties to the defense.'" *John Morrell & Co.*, 913 F.2d at 556 (citation omitted) (emphasis added). Mrs. Clinton, not this court retroactively applying a first time ruling regarding the White House, must waive the privilege before the grand jury may examine the notes the IC seeks.

B. Mrs. Clinton, the White House, and the Future

Rule 503(a)(4) states that a "communication is 'confidential' if not intended to be disclosed to third persons . . . ." The committee notes state that "intent is inferable from the circumstances." 2 Jack B. Weinstein et al., *Weinstein's Evidence* ¶ 503(a)(4)[01], at 503-39. *See* 56 F.R.D. 238 advisory committee's note.

Once aware by virtue of our opinion that her conversations with White House counsel may be disclosed to the grand jury because the White House may be obligated to respond to a subpoena under certain limited conditions, if Mrs. Clinton continues to have such conversations in the future she can no longer "intend" for the privilege to protect these conversations from a grand jury subpoena. *See, e.g.*, 2 Jack B. Weinstein et al., *Weinstein's Evidence* ¶ 503(a)(4)[01], at 503-39 & n. 2 (citing, among other cases, *Hollings v. Powell*, 773 F.2d 191, 196-97 (8th Cir. 1985), *cert. denied*, 475 U.S. 1119 (1986) (where mayor later testified to conversations with city attorney in a suit brought against mayor and city, the conversation was not intended to be confidential and the privilege was waived)).

IV. Conclusion

As between the IC and the White House, we must faithfully apply the *Nixon* decision because there is insufficient reason to distinguish that case from this one. As between the IC and Mrs. Clinton, we should understand the limits of the *Nixon* decision, and respect the fact that we are dealing with the rights of an individual. I would affirm the district court's prudent refusal to enforce the subpoena.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

IN RE: GRAND JURY SUBPOENA DUCES TECUM TO THE WHITE HOUSE	* * * * * * * * *	No. GO-96-3 FILED UNDER SEAL

MEMORANDUM OPINION AND ORDER

Before the Court is the motion of Independent Counsel Kenneth W. Starr for an order compelling production of two documents called for by grand jury subpoena duces tecum #2006 to the White House. The documents at issue consist of two sets of notes: one set taken by Associate White House Counsel Miriam R. Nemetz on July 11, 1995, at a meeting with First Lady Hillary Rodham Clinton, Special White House Counsel Jane C. Sherburne, and David E. Kendall, a private attorney representing the President and Mrs. Clinton in their personal capacities on "Whitewater" matters (the "Nemetz notes") ; and the second set taken by Ms. Sherburne at meetings with Mrs. Clinton on January 26, 1996 (the "Sherburne notes"). The White House and Mrs. Clinton have each filed a pleading in opposition to the Independent Counsel's motion and the Independent Counsel has filed a reply to their pleadings. The court held an *in camera* hearing on this matter on the afternoon of October 28, 1996, and afterwards directed that supplemental briefs be filed with respect to the issues raised at the hearing. Having carefully considered the pleadings of the parties and the evidence adduced during the hearing, the Court finds that the

Independent Counsel's motion to compel should be and hereby is denied.

I. *Background*

On August 5, 1994, the Special Division of the United States Court of Appeals for the District of Columbia appointed Kenneth W. Starr as Independent Counsel to conduct an investigation into the matter known as "Whitewater." The court appointed Mr. Starr pursuant to a request by Attorney General Janet Reno following Congress' reenactment of the Independent Counsel provisions of the Ethics in Government Act of 1978, 28 U.S.C. §§ 591-99. The court conferred upon Mr. Starr

> full power, independent authority, and jurisdiction to investigate to the maximum extent authorized by the (statute] whether any individuals or entities have committed a violation of any federal criminal law ... relating in any way to James B. McDougall's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty savings and Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc.

In re: Madison Guaranty Savings & Loan Ass'n, Div. No. 94-1, slip op. at 1-2 (D.C. Cir. Sp. Div. August 5, 1994). The court additionally conferred upon Mr. Starr "prosecutorial jurisdiction to fully investigate and prosecute the subject matter . . . as hereinbefore set forth, and all matters and individuals whose acts may be related to that subject matter, inclusive of authority to investigate and prosecute federal crimes . . . that may arise out of the above described matter, including perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses. *Id.* at 3.

Although the Independent Counsel's investigation initially focused on events that occurred in Arkansas prior to President

Clinton assuming office, it has since grown to encompass a number of matters involving conduct by White House officials. These matters include the May 1993 firing of employees of the White House Travel Office, the circumstances surrounding the death of former Deputy White House Counsel Vincent W. Foster, Jr., on July 20, 1993, and the subsequent handling of documents in his office; work performed by the Rose Law Firm for Madison Guaranty Savings & Loan while Mrs. Clinton was a partner in the firm; the January 1996 discovery of Rose Law Firm billing records in the White House residence; contacts between the White House and Treasury Department officials in 1993 and 1994 regarding criminal referrals potentially relating to Madison and Whitewater; and the handling of FBI background investigation files obtained by the White House in 1993.

Most of the matters being investigated by the Independent Counsel have also been the subject of investigations by various congressional committees in both houses of Congress. In fact, at the time of the meetings at issue in this case, there was a considerable amount of legal activity taking place with respect to Whitewater related matters. There were investigations in progress by the Independent Counsel, the Special Committee to Investigate Whitewater Development Corporation and Related Matters (the "Senate Whitewater Committee"), the House Committee on Banking and Financial Services, the House Committee on Government Reform and Oversight, the Federal Deposit Insurance Corporation, and the Resolution Trust Corporation. In addition, several White House officials had given or were about to give testimony to congressional committees and to a grand jury sitting in the District of Columbia. Various document subpoenas had also been issued to the White House. It was in this environment of

investigations and legal proceedings that the meetings in question took place.[1]

The meeting on July 11, 1995, concerned Mrs. Clinton's activities in the days immediately following the death of Deputy White House Counsel Vincent Foster. Mr. Kendall, a partner in the Washington, D.C., law firm of Williams & Connolly, states that on this day he met with Mrs. Clinton privately in the white House residence in the course of his representation of the President and Mrs. Clinton for the purpose of a legal consultation and to give legal advice. Late in this meeting, he was joined for the same purpose by Ms. Sherburne, the special White House counsel with responsibility for managing the White House response to the investigations of Whitewater matters, and Ms. Nemetz, who works under the direction of Ms. Sherburne. Ms. Sherburne and Ms. Nemetz were involved in gathering and analyzing the facts relevant to the matters under investigation and in responding to document requests from the Senate Whitewater Committee.[2] It was at this meeting that the Nemetz notes were created.

The meetings on January 26, 1996, concerned the January 1996 discovery of a copy of Rose Law Firm billing records in

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[1] The Independent Counsel does not dispute any of the assertions regarding the circumstances surrounding the meetings at issue here, and for purposes of today's decision, the Court assumes those assertions to be true.

[2] Hearings before the Senate Whitewater Committee on the Foster documents handling matter were scheduled to begin on July 18, 1995. In addition, the Independent Counsel had informed the White House that this matter would be discussed at a deposition scheduled for July 22, 1995.

the White House residence.[3] Mrs. Clinton had that same day testified pursuant to a subpoena about the discovery of these billing records before a grand Jury sitting in the District of Columbia, Mrs. Clinton was "debriefed" and counselled by her personal and official counsel in a private room at the United States Courthouse during breaks in her testimony and in the White House residence at the conclusion of her testimony. According to Mr. Kendall, these were confidential legal consultations during an ongoing representation for the purpose of giving legal advice. Present during the consultations at the Courthouse were White House Counsel John M. Quinn, Ms. Sherburne, Mr. Kendall, and Nicole K. Seligman, a partner with Mr. Kendall in the law firm of Williams & Connolly. Present during the consultations at the White House residence at the conclusion of Mrs. Clinton's testimony were Ms. Sherburne, Mr. Kendall, and Ms. Seligman. It was during these consultations at both the Courthouse and the White House residence that the Sherburne notes were created.

On June 21, 1996, grand jury subpoena duces tecum #2006 was directed to the White House. This subpoena required production of notes of interviews and meetings with Mrs. Clinton and White House officials on subjects including Madison, Whitewater, Capital Management Services, Inc., James B. McDougal, David L. Hale, and Vincent Foster. The White House identified nine sets of notes responsive to the subpoena, including the Nemetz and Sherburne notes. Although several matters regarding production of documents

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[3] These billing records were the subject of a May 1994 grand jury subpoena to Mrs. Clinton from a grand jury sitting in the Eastern District of Arkansas. White House aide Carolyn Huber testified before the Senate Whitewater Committee that she found the records on the third floor of the residence of the White House in July or August of 1995 and, not realizing what they were, placed them in a box in her East Wing office where they were discovered in January 1996.

had been resolved without judicial intervention, the White House refused production with respect to the Nemetz and Sherburne notes, asserting executive privilege, attorney-client privilege (both official and personal), and the work product doctrine as bases for withholding their production. The Independent Counsel thereupon filed the motion to compel now before the Court.[4]

II. *Discussion*

The White House and Mrs. Clinton argue that the Nemetz and Sherburne notes reflect communications between Mrs. Clinton, lawyers representing the Office of the President (of which the First Lady is a part), and lawyers representing Mrs. Clinton in her personal capacity for the purpose of providing legal advice to their respective clients. Thus, it is argued, these notes are fully protected against adversarial examination by the attorney-client privilege and the work product doctrine. The Independent Counsel does not question the purpose of the meetings, but rather argues that a federal government entity may not assert the attorney-client privilege and work product doctrine in response to a federal grand jury subpoena. Whatever the resolution of that issue, this Court concludes that the White House and Mrs. Clinton had a genuine and reasonable belief that her communications with personal and

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[4] Because the White House had indicated in correspondence with the Independent Counsel that one of the bases for withholding production of the Nemetz and Sherburne notes was executive privilege, the Independent Counsel extensively briefed this issue in his motion to compel. However, the White House stated in its pleadings in response to the Independent Counsel's motion and at the October 28 hearing that the President has chosen not to invoke executive privilege as a basis for withholding production of the notes. The Court therefore will not address that issue.

White House lawyers were confidential and for the purpose of receiving legal advice and that the Nemetz and Sherburne notes were taken in anticipation of litigation. These notes are therefore protected from disclosure to the grand jury by the attorney-client privilege and the work product doctrine.

A. *Attorney-Client Privilege*

"The attorney-client privilege is the oldest of the privileges for confidential communications known to the law." *Upjohn Co. v. United States,* 449 U.S. 383, 389 (1981). The privilege exists "to encourage full and frank communications between attorneys and their clients" and "to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Id.* at 389-91. "The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client." *Id.* at 389. *See also Jaffee v. Redmond,* 116 S.Ct. 1923, 1929 (1996). The prerequisites for a claim of privilege are found in proposed Federal Rule of Evidence 503, which is also known as Supreme Court Standard 503. Although not enacted by Congress, courts have relied on this rule "as an accurate definition of the federal common law of attorney-client privilege . . . ." *In re Bieter Co.*, 16 F.3d 929, 935 (8th Cir. 1994). The rule provides:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself or his representative and his lawyer or his lawyer's representative, or (2) between his lawyer and his lawyer's representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or

between the client and a representative of the client, or (5) between lawyers representing the client.

In re Bieter Co., 16 F.3d at 935 (quoting Supreme Court Standard 503(b)).

Whether there exists an attorney-client relationship in a given situation is based in large part upon the understanding of the client. "The professional relationship for purposes of the privilege hinges upon the belief that one is consulting a lawyer and his intention to seek legal advice." *Wylie v. Marley Co.*, 891 F.2d 1463, 1471 (10th Cir. 1989). *See also Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1319 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978). The attorney-client privilege thus attaches to confidential communications made to an individual in the mistaken, but reasonable, belief that the individual being consulted is his attorney. *United States v. Mullen & Co.*, 776 F. Supp. 620, 621 (D. Mass. 1991). *See also United States v. Rivera*, 837 F. Supp. 565, 567 n.1 (S.D.N.Y. 1993); *United States v. Tyler*, 745 F. Supp. 423, 425-26 (W.D. Mich. 1990); *United States v. Boffa*, 513 F. Supp. 517, 523 (D. Del. 1981). The burden of establishing that the information sought falls within the attorney-client privilege rests on the person claiming the privilege. *In re Grand Jury Proceedings (85 Misc. 140)*, 791 F.2d 663, 666 (8th Cir. 1986).

The Independent Counsel essentially argues that the White House's and Mrs. Clinton's assertion of attorney-client privilege, and thus any expectation of confidentiality in Mrs. Clinton's communications with lawyers from the White House Counsel's Office, is not well-founded for the following reasons: (1) Mrs. Clinton is not an officer or employee of the White House or Executive Branch and therefore does not have an attorney-client relationship with attorneys in the White House Counsel's office; (2) no court has ever held that a federal governmental attorney-client privilege may be asserted in response to a federal grand jury subpoena; (3) the White House was on specific notice that the Independent Counsel did not

believe such a privilege could be maintained against a federal grand jury subpoena; and (4) the conclusion in *United States v. Nixon*, 418 U.S. 683 (1974), demonstrates that a federal government entity may not assert a common-law attorney-client privilege in response to a federal grand jury. The Court will address these claims in turn.

1.

The Independent Counsel argues that because Mrs. Clinton is not elected, appointed, hired, or paid, she is not an officer or employee of the White House or Executive Branch and therefore does not have any conceivable attorney-client relationship with attorneys in the White House Counsel's Office. He argues that only when the First Lady is appointed to or assigned specified duties would it be plausible for the courts to recognize a governmental attorney-client privilege applicable to communications between her and White House attorneys, and as that situation does not exist in this case, the assertion of a governmental attorney-client privilege should be rejected. The Court disagrees.

Mrs. Clinton, like other First Ladies before her, has a widely recognized role as an advisor to the President and is generally considered to be a member of the President's inner circle. See *Judicial Watch, Inc. v. Clinton,* 880 F. Supp. 1, 4 (D.D.C. 1995) ("Mrs. Clinton advises the President on official and other matters"), *aff'd*, 76 F.3d 1232 (D.C. Cir. 1996). In this respect, the District of Columbia Circuit addressed the officer or employee status of the First Lady in *Association of American Physicians and Surgeons, Inc.* v. *Clinton*, 997 F.2d 898 (D.C. Cir. 1993), and concluded, based on 3 U.S.C. § 105(e), that the First Lady is a de facto officer or employee of the White House:

> *Congress* itself *has* recognized that the President's spouse acts as the functional equivalent of an assistant to the

President. The legislative authorization to the President to pay his White House aids includes the following provision:

> Assistance and services authorized pursuant to this section to the President are authorized to be provided to *the spouse of the President in connection with assistance provided by such spouse to the President in the discharge of the President's duties and responsibilities.* If the President does not have a spouse, such assistance and services may be provided for such purposes to a member of the President's family whom the President designates.

Id. at 904 (emphasis in original) (quoting 3 U. S.C. § 105(e)). The court noted that "section 105 (e) neither limits the particular kind of 'assistance' rendered to the President, nor circumscribes the types of presidential duties and responsibilities to be aided," and that it is thus reasonable "to construe section 105(e) as treating the presidential spouse as a de facto officer or employee." *Id.*

Although the status of the First Lady in *Association of American Physicians and Surgeons* was decided in the context of the Federal Advisory Committee Act, the reasoning of that case nevertheless applies to the situation before this court. Congress, as previously noted, has recognized in section 105(e) that the President's spouse acts as the functional equivalent of an assistant to the President, and section 105(e) neither limits the type of assistance to be rendered to the President nor the circumstances under which such assistance may be rendered. *See id.* 997 F.2d at 904. Accordingly, the Court finds that Mrs. Clinton was a de facto officer or employee of the White House for purposes of this case and that she enjoyed an attorney-client relationship with the lawyers from the White House Counsel's

Office in their representation of the official governmental interests of the White House and the Presidency.[5]

2.

The Independent Counsel argues that even if Mrs. Clinton may be considered an officer or employee of the White House, no court has ever held that a federal governmental attorney-client privilege may be asserted in response to a federal grand jury subpoena. He further argues that the White House was on specific notice that the Independent Counsel did not believe it could maintain such a privilege against a federal grand jury subpoena and that any expectation of confidentiality was thus unreasonable.

It is true that there does not appear to be any authority specifically holding that a federal governmental attorney-client privilege may be asserted in response to a federal grand jury subpoena.[6] By the same token, however, there apparently is no

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[5] The Independent Counsel acknowledges that communications between Mrs. Clinton and her personal counsel, Mr. Kendall and Ms. Seligman, are protected by the attorney-client privilege. Because the Court concludes that Mrs. Clinton enjoyed an attorney-client relationship with lawyers from the White House Counsel's Office, there is no need to discuss the common-interest or joint defense rule.

[6] The White House cites a state court case from New Jersey, *In re Grand Jury Subpoenas*, 574A.2d 449 (N.J. Super. A.D. 1989), and a Sixth Circuit case, *In re Grand Jury Subpoena*, 886 F.2d 135 (6th Cir. 1989), both of which applied the governmental attorney-client privilege to the criminal process. The Court does not find these cases to be particularly relevant. The New Jersey case was decided in the context of a state grand jury and without extended discussion. There are quite

authority specifically holding that a federal governmental attorney-client privilege *may not* be asserted in such a situation. Although the White House (but not, apparently, personal counsel) may have been put on specific notice that the Independent Counsel did not agree that communications between a witness and the White House Counsel's Office were privileged from disclosure to a federal grand jury, the White House took a different view. Such a dispute regarding the governing law does not render unreasonable the reliance on the attorney-client privilege in this case. In this respect, the White House's and Mrs. Clinton's position on this issue, while it may ultimately turn out to be erroneous, cannot be characterized as being without any foundation. Even prior to the meetings at issue here, the White House Counsel's office has generally considered confidential communications by its lawyers for the purpose of legal advice to be shielded by the attorney-client privilege, see Jeremy Rabkin, *At the President's Side: The Role of the White House Counsel in Constitutional Policy*, 56 Law and Contemporary Problems 63, 64 (1993) (the White House Counsel's office "regards all of its communications with the president as shielded by attorney-client privilege"), and it is generally accepted that the attorney-client privilege applies in

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different considerations involved with respect to federal government entities before a federal grand jury, and such issues were not addressed in that case. In the Sixth Circuit case, the Independent Counsel correctly notes that the governmental attorney-client issue was not even raised or discussed and that this case is not precedent for an issue neither presented nor decided. *See Brecht v. Abrahamson,* 507 U.S. 619, 631 (1993) (stare decisis does not apply to an issue never squarely addressed but at most assumed in previous decisions). Moreover, the government entities in the Sixth Circuit case were the City of Detroit and the Detroit City Council. Again, different considerations are involved with respect to federal government entities.

the governmental context in civil cases, *see, e.g., Jupiter Painting Contracting Co. v. United States,* 87 F.R.D. 593, 598 (E.D. Pa. 1980) ("[c]ourts generally have accepted that attorney-client privilege applies in the governmental context"); *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980) (noting that it is clear a government agency can be a "client" and agency lawyers can function as "attorneys" within the relationship contemplated by the attorney-client privilege); *Department of Economic Development v. Arthur Anderson & Co.*, 139 F.R.D. 295, 300 (S.D.N.Y. 1991) (same). Thus, the fact that a federal government entity would invoke the attorney-client privilege is by no means novel.

Moreover, it is not always clear whether personal counsel or White House Counsel's office attorneys representing the Office of the President should undertake various legal assignments. Several of the matters under investigation, while originating prior to the date of President Clinton's inauguration (January 20, 1993), involved events that occurred after that date, an example being the discovery of the Rose Law Firm billing records in the White House residence. Many of the factual and legal issues span the date of Inauguration and thus require the services of both personal and official lawyers.[7] That

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[7] The Court recognizes that there are no specific guidelines setting forth the duties of the White House Counsel and that such duties have, for various reasons, changed from one administration to the next. *See* Rabkin, *supra*, at 68-69. Nevertheless, no one argues that the duties of the White House Counsel entail providing legal services to the President or First Lady with respect to matters of a purely personal nature. (As noted by the Independent Counsel, the White House has not suggested that the President or First Lady utilized White House lawyers in this case for personal legal services that would warrant a personal attorney-client privilege.) While it may be appropriate for the White House Counsel's Office to represent

being the case, and considering that the meetings at issue here took place in the midst of several investigations and legal proceedings of an adversarial nature,[8] it cannot be said that Mrs. Clinton was unreasonable in seeking the advice of counsel in both her personal and official capacity. *See also Rabkin, supra,* at 74 (noting that the advice of the White House Counsel has taken on much greater importance with the specter of the independent counsel). Indeed, the Independent Counsel implicitly acknowledged the dual nature of Mrs. Clinton's legal identity when both personal and White House lawyers were present at each of her three interviews conducted at the White House by the Independent Counsel. The Independent Counsel did not object to the presence of White House lawyers at these interviews and, in fact, negotiated the terms of the interviews with both sets of counsel. Although the meetings at issue were not specifically conducted at the behest of the Independent

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the Office of the President with respect to Whitewater matters that specifically affect that Office, it appears that Deputy White House Counsel Vincent Foster was handling matters that concerned events occurring prior to Inauguration and beyond the purview of the White House Counsel's Office. Shortly after Mr. Foster's death, documents relating to these matters were transferred from Mr. Foster's office to the third floor of the residence of the White House and then taken to the Clintons' private attorneys, apparently in recognition that personal counsel should have been handling these matters in the first place. The issues in this case have been complicated somewhat by the manner in which the White House Counsel's office has defined its area of responsibility.

[8] The independent Counsel candidly states in his motion to compel that Mrs. Clinton's testimony on several issues under investigation "has changed over time or differs from that of other witnesses" and trial she "is a central figure" in his investigation.

Counsel, there is no dispute that Mrs. Clinton, her personal counsel, and the White House lawyers all considered these meetings to involve confidential attorney-client communications in her personal and official capacities. The uncertainty of the law in this area does not render unreasonable this expectation of confidentiality.

The case of *United States v. Tyler*, 745 F. Supp. 423, cited previously, is particularly interesting and illustrates the types of circumstances under which an expectation of confidentiality may be considered reasonable. In that case, James E. Tyler was incarcerated in a federal prison with an individual named Melvin P. Deutsch. Tyler testified that he believed Deutsch was an attorney because Deutsch had several diplomas, including a law school diploma, on the wall of his cell and he, along with other inmates, addressed Deutsch as "counselor." *Id.* at 424. Believing him to be an attorney, Tyler paid Deutsch $50.00 to represent him on a matter involving the parole board and made confidential communications to Deutsch seeking legal advice and opinions. *Id.* at 424, 426. It turned out, however, that Deutsch had apparently never attended law school or been licensed to practice law and, further, was assisting the government. *Id.* at 424. The court nevertheless concluded that because Deutsch held himself out to be an attorney to Tyler and others, and because Tyler's belief in this regard was reasonable, the confidential communications to Deutsch were protected by the attorney-client privilege. *Id.* at 426.

As the *Tyler* case demonstrates, the attorney-client privilege will apply to confidential communications between an individual and a person he or she reasonably believes to be his or her attorney, even if that belief later turns out to be mistaken. The Court would only note that the reasonableness of the White House's and Mrs. Clinton's expectations of confidentiality in this case, based as it was on communications with licensed attorneys and in the midst of adverse legal proceedings, is

clearly on stronger footing than was the reasonableness of Tyler's belief.[9]

3.

The Independent Counsel argues that the conclusion in *United States v. Nixon*, 418 U.S. 683, regarding the outer limits of the common-law privilege for Presidential communications demonstrates that there can be no broader common-law governmental attorney-client privilege applicable in federal criminal proceedings. He argues that because *Nixon* held that the most sensitive, most delicate, and most privileged documents in the Executive Branch (other than state secrets) must be produced in federal criminal proceedings, it follows logically that no other Executive Branch documents should receive greater protection as a matter of federal common law.

The Court does not find *Nixon* to be dispositive of the issues in this case. In *Nixon,* the district court issued a trial subpoena for tape recordings of conversations among President

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[9] Referring to the *Tyler* case, Mr. Kendall stated at the October 28 hearing that "[i]f Perry Mason had written this case, it would be called the case of the counterfeit counsel, but alas for Mr. James Elliot Tyler, it was a real case." Tr. 109. The "counterfeit counsel" to whom Mr. Kendall referred, Melvin P. Deutsch, is now incarcerated in a federal prison in Texas and continues to this day to purport to engage in the practice of law. Indeed, Mr. Deutsch recently submitted to this Court in the contempt proceedings involving Susan H. McDougal, on her behalf, a "Notice of Motion, "Friend of the Court Application," and "Petition for a Writ of Habeas Corpus." The Court notified Mr. Deutsch by letter dated October 21, 1996, that these materials would not be considered since, among other things, Ms. McDougal is already represented by counsel.

Nixon and various aides and advisers, including White House Counsel John W. Dean. The President resisted the subpoena, claiming a general privilege against disclosure of confidential communications. In rejecting the President's claim, the Supreme Court balanced the President's "generalized privilege of confidentiality" against "the constitutional need for relevant evidence in criminal trials" and held as follows:

> We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.

Id. 418 U.S. at 712-13.

Nixon is distinguishable for several reasons. Unlike the situation before this Court, there was no claim of attorney-client privilege made by the President in *Nixon*, and the Court thus did not address whether such a privilege could be sustained. Even had such a privilege been asserted, the result would most likely have been the same since the lawyer with whom the President engaged in confidential communications, White House Counsel John Dean, admitted that he was communicating with the President for the purpose of participating in a conspiracy to commit federal crimes.[10] It is

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[10] Under the crime-fraud exception, attorney-client communications lose their privileged character when the lawyer is consulted not with respect to past wrongdoings but rather to further a continuing or contemplated criminal or fraudulent scheme. *In re Berkley & Co., Inc.*, 629 F.2d 548, 553 (8th Cir. 1990). The Independent Counsel has not alleged that Mrs. Clinton was consulting White House lawyers for such a purpose and this Court therefore did not conduct an *in camera*

thus doubtful that a claim of attorney-client privilege would have afforded President Nixon any protection from ultimate production of the tapes. In addition, the materials subpoenaed in Nixon consisted of taped conversations whereas the materials in this case consist of attorney work product in the form of attorneys' notes written during meetings of the client and her attorneys. Different considerations are attendant to an assertion of the work product protection, considerations which were not addressed in *Nixon.* The Supreme Court's opinion in *Nixon*, then, while perhaps relevant to a discussion of whether the governmental attorney-client privilege and work product doctrine may as a general matter be asserted in response to a federal grand jury subpoena, cannot be read as conclusively rejecting the White House's and Mrs. Clinton's claims in the matter before the Court. These issues were not raised or discussed in *Nixon,* and the case is not precedent for issues neither presented nor decided. See note 6, *supra.*[11]

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examination of the subpoenaed material at the October 28 hearing.

[11] The Independent Counsel also cites 28 U.S.C. § 535(b) in support of his argument, stating that this statute compliments *Nixon* and is evidence that there cannot be a "governmental attorney-client privilege in federal grand jury proceedings. Section 535(b) provides that "(any information, allegation, or complaint received in a department or agency of the executive branch of the Government relating to violations of title 18 [18 USCS §§ 1 *et seq.*] involving Government officers and employees shall be expeditiously reported to the Attorney General by the head of the department or agency . . . ." As was the case in *Nixon,* this provision says nothing of the attorney-client privilege or work product doctrine and cannot be read as conclusively rejecting the White House's and Mrs. Clinton's claims in the matter before the Court.

4.

In sum, the meetings with Mrs. Clinton occurred at a time when several congressional investigations were in progress, when two grand juries had been impaneled, and when Mrs. Clinton was (and apparently still is) a "central figure" in the investigation of the Independent Counsel. The law governing application of the attorney-client privilege in this area, as acknowledged by the Independent Counsel, is uncertain, and Mrs. Clinton, as the functional equivalent of an officer or employee of the White House, considered her communications with lawyers from the White House Counsel's Office and personal counsel, as did those lawyers, to be confidential and for the purpose of receiving legal advice. Under these circumstances, the Court concludes that the White House's and Mrs. Clinton's belief in this regard was genuine and reasonable (whether or not mistaken) and that the Nemetz and Sherburne notes are therefore protected from disclosure to the grand jury by the attorney-client privilege.

B. *Work Product Doctrine*

The White House and Mrs. Clinton additionally assert that the Nemetz and Sherburne notes are protected from disclosure to the grand jury by the work product doctrine. The Independent Counsel argues, however, that the work product doctrine does not apply in this situation for the same reasons he claims the attorney-client privilege does not apply. He additionally argues that the notes were not prepared in anticipation of litigation, a requirement of the work product doctrine, and therefore the doctrine is not applicable. The Court disagrees on both points.

The work product doctrine was designed to prevent unwarranted inquiries into the files and mental impressions of an attorney and recognizes that it is essential that a lawyer work with a certain degree of privacy. *Hickman v. Taylor,* 329 U.S.

495, 510-11 (1947). *See also In re Chrysler Motors Corp. Overnight Evaluation Program,* 860 F.2d 844, 846 (8th Cir. 1988) (citation omitted). The work product doctrine is distinct from and broader than the attorney-client privilege. *In* re *Grand Jury Subpoenas Duces Tecum,* 773 F. 2d 204, 206 (8th Cir. 1985). The test for whether the work product doctrine applies is not whether litigation has begun but whether documents were prepared or obtained in anticipation of litigation. *In re Grand Jury Proceedings,* 473 F.2d 840, 847 (8th Cir. 1973).

The Nemetz and Sherburne notes are attorney work product based on the meetings with Mrs. Clinton. To the extent these notes reveal communications, they are protected by the attorney-client privilege for the reasons previously stated. *See Upjohn,* 449 U.S. at 401. To the extent they do not reveal communications, they reveal the attorneys' mental processes in evaluating the communications. *Id.*[12] The Nemetz and Sherburne notes are thus work product of the type that is clearly protected from disclosure to the grand jury. *See In re Grand Jury Proceedings,* 473 F.2d at 847 (holding attorney's witness notes absolutely protected from disclosure in grand jury setting and noting that to require the attorney "to state what he remembers or what he saw fit to write down as to the remarks of a witness would carry additional dangers not involved when the lawyer is merely asked to turn over a statement that the witness has signed") (quoting C. Wright, *Law of Federal Courts,* 362 (2d ed. 1970)).

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[12] Mr. Kendall states that both sets of notes, in addition to reflecting the substance of communications at the meeting between a client and her attorneys, also reflect the thoughts, impressions, and strategies of all the lawyers present. As previously noted, the Independent Counsel does not dispute the assertions regarding the circumstances of the two meetings, and this Court has not reviewed the notes *in camera,* there having been no claim that these communications fall within the crime-fraud exception.

While litigation night not have been immediately imminent when the meetings took place, there nevertheless were numerous adverse legal proceedings in progress, including two grand jury investigations. Such legal proceedings satisfy the "in anticipation of litigation" requirement of the work product doctrine. *See, e.g., In re Grand Jury Proceedings,* 473 F.2d 840 (applying work product doctrine to grand jury proceedings); *In re Sealed Case,* 29 F.3d 715, 718 (D.C. Cir. 1994) (noting that the "in anticipation of litigation" requirement of the work product doctrine is satisfied where attorney "had an eye toward litigation"); *Holland v. Island Creek Corp.*, 885 F. Supp. 4, 7 (D.D.C. 1995) (same). Because the White House and Mrs. Clinton genuinely and reasonably considered her communications with lawyers from the White House Counsel's Office and personal counsel to be confidential and for the purpose of receiving legal advice, and because the Nemetz and Sherburne notes were taken in anticipation of litigation, these notes are protected from disclosure to the grand jury under the work product doctrine.

III. *Conclusion*

Both the White House and the Independent Counsel would prefer that this Court resolve the issue of whether a federal government entity may assert the attorney-client privilege and work product doctrine in response to a federal grand jury subpoena. The general practice of this Court, however, is to decide issues on narrow grounds and not to resolve difficult and complex issues unnecessarily. With this principle in mind, the Court concludes that these notes are protected from disclosure by the reasonable belief of the White House and Mrs. Clinton that the communications were privileged and by the fact that the notes are attorney work product.

IT IS THEREFORE ORDERED that the Independent Counsel's motion to compel production of the Nemetz and

Sherburne notes called for by grand jury subpoena duces tecum #2006 to the White House be and it hereby is denied.

Dated this 26th day of November 1996.

/s/
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

IN RE:	GRAND JURY SUBPOENA DUCES TECUM TO THE WHITE HOUSE	No. GJ-96-3 (UNDER SEAL)

DECLARATION OF JANE C. SHERBURNE

I, Jane C. Sherburne, declare as follows:

1. I am an active member of the Bar of the District of Columbia.

2. I have been employed by the White House as Special Counsel to the President since January 3, 1995.

3. I am familiar with and consider my ethical obligations to be governed by the District of Columbia Rules of Professional Conduct.

4. My duties as Special Counsel to the President include the representation of the Office of the President with regard to the investigation by Independent Counsel Kenneth Starr (the "IC") and the congressional investigations of allegations related to what has come to be known as "Whitewater."

5. The IC has investigated a number of matters involving conduct by White House officials, including the handling by White House officials of documents in the office of Deputy Counsel Vincent Foster following his death (the

"Foster document handling" matter) and the discovery in the White House Residence and subsequent production of Rose Law Firm billing records by White House officials (the "Rose Law Firm billing records" matter).

6. These matters also have been investigated by congressional committees, contemporaneously with the IC's investigation. Specifically, the Special Committee to Investigate Whitewater and Related Matters (the "Senate Whitewater Committee"), has investigated the Foster document handling and Rose Law Firm billing records matters. The House Committee on Government Reform and Oversight (the "Government Reform Committee") has had an investigative interest in the Foster document handling matter. The House Committee on Banking and Financial Services (the "House Banking Committee") has had an investigative interest in both matters.

7. In connection with these and other matters under investigation by the IC, Counsels to the President and I, as well as several lawyers in the White House Counsel's Office working under my direction, have provided a variety of legal advice and services to the Office of the President.

a. I have advised and assisted the Office of the President by managing its response to document requests and subpoenas. These services have included interpreting requests, negotiating with both the IC and congressional committees regarding the scope of requests, determining what document collection methods are sufficient, and overseeing the actual production of documents to the requesters. In addition, I have advised the Office of the President regarding how the information in the documents and our response to these requests should be explained to the public.

b. I have advised and assisted the Office of the President in determining whether any privileges or other confidentiality interests should be asserted with regard to any of the information requested. I have negotiated with the IC and

congressional committees to accommodate interests in privileged material. I have advised the Office of the President regarding how any assertions of privilege should be explained to the public.

c. I have advised the Office of the President on matters related to appearances by White House officials before congressional investigating committees. I have negotiated the terms of such appearances with such committees and advised witnesses, primarily through their privately retained counsel, about the application of privileges to possible areas of questioning.

d. I have represented the interests of the Office of the President in seeking to ensure that the conduct of White House officials is portrayed accurately and without distortion at public hearings conducted by congressional investigating committees.

e. I have assisted and advised the Office of the President in determining whether any matters under investigation involve conduct by White House officials that should be addressed by the Office of the President.

f. I have assisted and advised the Office of the President regarding the issuance of public statements relating to the matters under investigation.

h. Without objection from the IC, Counsels to the President and I have represented the Office of the President at interviews by the IC of the President and the First Lady. We also have represented the interests of the Office of the President in discussions with the IC regarding such interviews and in the preparation of the President and the First Lady for these interviews.

8. The legal advice and assistance described above has been necessary, not only to satisfy legal obligations of the Office of the President with regard to the ongoing investigations, but also to preserve public confidence in the

Presidency, avoid new allegations of impropriety related to our response to the investigations, and permit the Office of the President to fulfill effectively, with a minimum of distraction, its function to further the policies and initiatives of the President.

9. To perform effectively the legal services described above, it is essential for lawyers representing the Office of the President to learn and understand the facts underlying each investigation. This process has involved, among other things, frequent consultation with private counsel for White House officials, including private counsel for the President and the First Lady. (In many instances, White House officials also have retained private counsel to represent them in inquiries related to the performance of their official duties.)

10. Because of the prominence of their official roles, the President and the First Lady require representation in both their private and their official capacities in connection with almost every aspect of the various Whitewater inquiries. The Office of the President shares a common interest with the President and First Lady in many respects. Consultation between the private attorneys for the President and the First Lady and attorneys for the Office of the President is necessary to permit the proper allocation of responsibility among counsel, appropriate responses to document requests, the sharing of facts relevant to both representations, and the discussion of potential advice.

11. The IC seeks to compel production of two sets of notes taken by lawyers for the Office of the President in the course of performing their duties. The first set of notes was taken by Miriam Nemetz, Associate Counsel to the President, on July 11, 1995 (the "Nemetz notes"). The second set of notes was taken by me on January 26, 1996 (the "Sherburne notes"). I will describe below the circumstances surrounding the creation of each set of notes.

12. At the time of the creation of each set of notes, there were in progress active investigations of Whitewater-related matters by the IC, the Senate Whitewater Committee, the House Banking Committee, the Government Reform Committee, the FDIC, and the RTC. During this period, many White House officials had given or were about to give testimony to congressional committees and to the grand jury empaneled by the IC in Washington, D.C. The congressional committees and the IC also had directed document subpoenas or requests to the White House.

13. On June 12, 1994, Special Counsel Fiske questioned the President and Mrs. Clinton about their knowledge of the Foster document handling matter in depositions in the White House Residence. After Mr. Fiske was replaced, the new IC Kenneth Starr indicated an interest in posing additional questions to the President and the First Lady related to this matter. By letter dated July 6, 1995, the IC indicated that this matter would be among the subjects covered in the scheduled July 22, 1995 depositions.

14. Further, in early July 1995, I and lawyers working under my direction, including Ms. Nemetz, were preparing for hearings before the Senate Whitewater Committee regarding the Foster document handling matter, scheduled to begin on July 18, 1995. This work involved the gathering and analysis of facts related to the events under investigation as well as the collection, review, and production of documents responsive to requests from the Senate Whitewater Committee.

15. The Office of the President determined, prior to the start of the hearings, that in order to facilitate public understanding of the events being investigated it was necessary to present accurately the relevant facts to the public. Before proceeding, however, we needed to complete our understanding of Mrs. Clinton's knowledge of the matter. I therefore asked to meet with her to discuss her activities during the period immediately following Mr. Foster's suicide.

16. I met with Mrs. Clinton on July 11, 1995. The other people present at the meeting were David Kendall, a partner at the law firm of Williams & Connolly, who represents the President and Mrs. Clinton in their personal capacities, and Ms. Nemetz. Ms. Nemetz took notes during the meeting. As planned, the subject of the meeting was Mrs. Clinton's activities in the period immediately following Foster's death. I understood the meeting was a confidential attorney-client communication.

17. The discussion with Mrs. Clinton facilitated the representation of the Office of the President in several ways. First, the interview formed the basis for subsequent advice to the Office of the President, including Mrs. Clinton as one of its constituents, regarding the scheduled IC depositions. Second, the information obtained in the interview, and any insights from the discussion, assisted the Office of the President in providing informed and accurate information to the public about the Foster matter. And, third, the interview was necessary to enable me to advise the Office of the President how appropriately to respond to allegations leveled against the First Lady in the ensuing public hearings before the Senate Whitewater Committee.

18. On January 4, 1996, I learned that Ms. Carolyn Huber, a White House employee, had located in the White House Residence a copy of billing records relating to work performed by attorneys at the Rose Law Firm, including Mrs. Clinton, for Madison Guaranty. In consultation with Mrs. Clinton's private counsel, the billing records were turned over promptly to the IC, the Senate Whitewater Committee, the House Banking Committee, the FDIC and the RTC. The IC and the Senate Whitewater Committee immediately launched investigations related to the finding of the billing records. The regulatory agencies also undertook to scrutinize the billing records.

19. On January 19, 1996, the IC issued a subpoena for Mrs. Clinton to testify before the grand jury in Washington, D.C., regarding the discovery of the billing records. I participated in negotiations with the IC regarding the subpoena to Mrs. Clinton.

20. On January 26, 1996, Mrs. Clinton testified before the grand jury. During breaks in the proceeding, and following its conclusion, Mrs. Clinton met jointly with her private lawyers and with lawyers for the Office of the President to discuss her testimony before the grand jury. Mr. Kendall, his partner Nicole Seligman, and I participated in these conversations. Counsel to the President John M. Quinn was present at the discussions during the breaks. I took notes during these conversations with Mrs. Clinton. I understood these conversations to be confidential attorney-client communications.

21. The debriefing of Mrs. Clinton regarding her grand jury testimony facilitated the representation of the Office of the President in several ways. Participation in the debriefing permitted lawyers for the Office of the President to protect the interests of the office with regard to Mrs. Clinton's testimony. It also facilitated advice to Mrs. Clinton regarding how to address the grand jury appearance and the billing records matter in her role as First Lady of the United States. The information provided by Mrs. Clinton in the debriefing also facilitated advice to the Office of the President regarding responses to congressional inquiries and future requests from the IC regarding the matter, and to ensure the accuracy of public statements by the White House about the billing records and the grand jury appearance.

22. The confidentiality of both the Nemetz notes and the Sherburne notes has been carefully maintained. The notes have been disclosed only to lawyers representing the Office of the President with a need to see them and to private counsel for Mrs. Clinton.

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 30, 1996.

/s/
Jane C. Sherburne

FILED UNDER SEAL -- GRAND JURY MATERIALS

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

IN RE: GRAND JURY SUBPOENA DUCES TECUM TO THE WHITE HOUSE	)	No. GJ-96-3 (UNDER SEAL)

City of Washington)
) ss:
District of Columbia)

AFFIDAVIT OF DAVID E. KENDALL

David E. Kendall, being duly sworn, deposes and says:

(1) I am a practicing attorney, a partner at the Washington, D.C., law firm of Williams & Connolly, and an active member of the District of Columbia Bar.

(2) Since 1993, my law firm and I have continuously represented the President and Mrs. Clinton ("the clients") as personal counsel with respect to "Whitewater" matters. This has included representing the clients with respect to investigations conducted by the Department of Justice, Independent Counsel Robert Fisk, Independent Counsel Kenneth Starr, the Resolution Trust Corporation ("RTC"), the Federal Deposit Insurance Corporation ("FDIC"), the Inspector General's Office of the FDIC, and various Committees of the House and Senate.

(3) My clients have a common interest with the Office of the President in, inter alia: (a) becoming fully informed as to all relevant facts so as to provide accurate information on "Whitewater" matters to the Independent Counsel ("IC"), the RTC, the FDIC, Congressional Committees, private litigants, and the public; (b) responding appropriately to document requests from various entities; (c) defending against false or meritless allegations and charges; (d) obtaining requisite legal services efficiently and economically, with the least possible imposition; and (e) protecting and exercising as appropriate all legal rights, privileges and remedies, based upon the fully informed advice of counsel. Because it is not always self-evident whether personal counsel or White House Counsel's Office attorneys representing the office of the President should undertake various legal assignments, it is necessary for the two sets of counsel to be able to confer confidentially and to coordinate their efforts in order to assure that all legal duties are performed and all common interests are protected in a timely, thorough, and responsible manner.

(4) The clients have fully cooperated with the IC's investigation. In response to numerous document requests, they have produced more than 75,000 documents. They have responded to written interrogatories. Personal counsel have supplied information to the IC informally on numerous occasions. The clients have given testimony under oath at the White House, pursuant to the IC's request, on three different occasions: June 12, 1994; April 22, 1995; and July 22, 1995. Moreover, Mrs. Clinton testified before a federal grand jury in Washington, D.C., on January 26, 1996, and was examined by counsel for the IC. In 1994, the clients produced thousands of documents to the RTC, and they submitted lengthy interrogatory responses to the RTC in May, 1995. Mrs. Clinton also responded to supplemental interrogatories in January, 1996, and gave oral testimony to the RTC in February, 1996. The RTC elected ultimately to take no enforcement action. An investigation by the Inspector General of the FDIC is

apparently still pending. In addition, beginning in 1994, the FDIC was conducting a civil investigation of Mrs. Clinton's legal work at the Rose Law Firm. Mrs. Clinton had produced documents, answered FDIC interrogatories, and, in November, 1994, was examined orally by FDIC investigators. The clients have also responded to various requests for information, including producing documents, answering interrogatories, and providing information informally, from Congressional Committees on "Whitewater" matters.

(5) On July 11, 1995, I had a confidential meeting with Mrs. Clinton in the Residence at the White House for the purpose of giving legal advice. Late in this meeting, two attorneys from the White House counsel's Office (Jane C. Sherburne and Miriam R. Nemetz) joined Mrs. Clinton and me, to continue the meeting, for the same purpose. The first of the two documents the IC now seeks to obtain is the set of notes that Ms. Nemetz took during the time she was in attendance.

(6) On January 26, 1996, Mrs. Clinton testified pursuant to subpoena before a federal grand jury in Washington, D.C. During breaks in her testimony and at the conclusion of her testimony, Mrs. Clinton was confidentially counseled and "debriefed" by her attorneys. The sessions with Mrs. Clinton which occurred in a private room at the federal courthouse during breaks in her testimony were attended by me, my partner Nicole K. Seligman, White House Counsel John M. Quinn, and Ms. Sherburne. The session with Mrs. Clinton which occurred at the White House Residence at the conclusion of her testimony was attended by Ms. Sherburne, Ms. Seligman, and me. The second of the two documents the IC now seeks to obtain is the set of notes Ms. Sherburne took during these sessions with Mrs. Clinton.

(7) On both July 11, 1995, and January 26, 1996, a great deal of litigation and a great many adversarial proceedings were in progress or threatened, including the Independent Counsel's investigation (which had resulted in a number of guilty pleas

and one pending indictment on July 11, 1995, and two pending indictments on January 26, 1996), the RTC's civil investigation, and Senator D'Amato's investigation (on the relevant dates, he chaired the Special Committee to Investigate Whitewater Development Corporation and Related Matters).

(8) As members of the District of Columbia Bar, Ms. Seligman and I are governed by the Rules of Professional Conduct promulgated in a 1990 order of the District of Columbia Court of Appeals. Rule 1.6(a) provides that a lawyer may not knowingly reveal information protected by the attorney-client privilege or certain other information gained in the professional relationship, in the absence of waiver or an explicit exception. I believe, and believed at the time of the meetings, that Rule 1.6(a) is also applicable to the conduct of Mr. Quinn, Ms. Sherburne, and Ms. Nemetz who are, to my knowledge, also members of the District of Columbia Bar.

(9) In my professional opinion, it would be impossible for Ms. Seligman and me to advise our clients effectively and efficiently on matters of common interest with the Office of the President unless we could enjoy a confidential professional relationship with attorneys from the White House Counsel's office, which represents our clients in their official capacity. I reasonably believed that such a relationship in fact existed on July 11, 1995, and Ms. Seligman and I reasonably believed that such a relationship in fact existed on January 26, 1996.

/s/
DAVID E. KENDALL

Subscribed and sworn to before me
this 30th day of September

/s/
Notary Public

Rule 501. General Rule.

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim of defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

No. 96-1783

Supreme Court, U.S.
FILED
MAY 12 1997
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

OFFICE OF THE PRESIDENT,

Petitioner,

v.

OFFICE OF INDEPENDENT COUNSEL, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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RESPONSE OF HILLARY RODHAM CLINTON IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Attorneys for Respondent Hillary Rodham Clinton

**Counsel of Record*

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the Office of the President does not possess an attorney-client privilege that may be asserted in response to a federal grand jury subpoena and must comply with the subpoena.

2. Whether work performed by attorneys for an entity of the federal government in anticipation of grand jury proceedings involving the entity and employees of the entity, or in preparation for legislative hearings investigating the operations of the entity, is protected under the attorney work product doctrine.

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties listed in the caption,
Hillary Rodham Clinton was a party in the court of appeals.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1783

OFFICE OF THE PRESIDENT,

Petitioner,

v.

OFFICE OF INDEPENDENT COUNSEL, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

RESPONSE OF HILLARY RODHAM CLINTON IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Respondent Hillary Rodham Clinton respectfully submits this response in support of the petition for a writ of certiorari filed by the Office of the President to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS AND ORDERS BELOW

The memorandum opinion and order of the district court (Pet. App. 62a-83a)[1] is unreported. The opinion of the court of appeals (Pet. App. 1a-61a) is not yet reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on April 9, 1997. This Court has jurisdiction to review that judgment pursuant to 28 U.S.C. § 1254(1).

RULE INVOLVED

The text of Rule 501 of the Federal Rules of Evidence is set forth at Pet. App. 96a.

STATEMENT

Respondent[2] adopts and incorporates herein by reference the statement of facts set forth in the petition for a writ of certiorari filed by the Office of the President.

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[1] References to "Pet. App." are to the appendix to the petition for a writ of certiorari filed by the Office of the President.

[2] In the court below, Mrs. Clinton filed a motion to intervene prior to briefing and argument, and that motion was granted. She proceeds here as a respondent, pursuant to this Court's Rule 12.6, and files this response in support of the Office of the President's petition for a writ of certiorari. *See Metropolitan Washington Airports Auth. v. Citizens for Abatement*, 501 U.S. 252, 264 n.12 (1991); *Director v. Perini N. River Assocs.*, 459 U.S. 297, 304 (1983); *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 783-84 (1980).

ARGUMENT

The decision of the court below does not directly invade respondent Clinton's ability to consult confidentially with her personal counsel. The Independent Counsel ("IC") did not seek notes taken by her own attorneys, nor seek to intrude upon the sanctity of a meeting solely between her and her private lawyers. Accordingly, respondent is not filing a petition for a writ of certiorari on her own behalf.

The decision below nevertheless has important implications for any person in public life who, like Mrs. Clinton, may have an "official" capacity as a constituent part of a government entity that is represented by government counsel. The Eighth Circuit majority opinion makes impossible the confidential, effective, and efficient consultation of such a person's personal lawyers with government lawyers who represent the agency with which the person is affiliated. The ability to consult candidly and privately is vital if both sets of counsel are to do their jobs properly. Respondent is therefore filing this response in support of the position of the Office of the President and respectfully submits that the petition for writ of certiorari filed by that Office should be granted, for the reasons set forth in the petition and adopted here by reference. A few additional observations are appropriate.

1. There is no issue presented of the Independent Counsel's ability to obtain information from Mrs. Clinton. Indeed, she has made herself freely available to the IC, testifying orally under oath three times at the White House

and once before the IC's grand jury in Washington, D.C.[3] Moreover, the IC has been free to question Mrs. Clinton about the underlying facts that she may have discussed with her personal or White House counsel.

2. The ruling of the court below is quite literally unprecedented. As the petition of the Office of the President makes clear, there are many cases recognizing a federal governmental attorney-client privilege in the civil context, Congress has explicitly provided for it in (for example) the Freedom of Information Act, state bar ethics rules apply to the relationship of government lawyers and their clients,[4] and the great weight of scholarly authority acknowledges the privilege. Moreover, the Eighth Circuit majority's invention of a context-specific exception to the federal attorney-client privilege constitutes a radical departure from decisions of this Court over a period of 170 years recognizing that this privilege is--and must be--absolute. *See*, *e.g.*, *Chirac v. Reinicker*, 24 U.S. (11 Wheat.) 280, 294 (1826)[5]; *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U.S. 457, 458 (1877); *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888); *United States v. Louisville & Nashville R.R.*, 236 U.S. 318, 336 (1915). As this Court observed in *Upjohn Co. v. United*

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[3] She also has provided sworn answers to interrogatories submitted by the IC, and she and the President have produced over 90,000 pages of documents to the IC.

[4] All of the attorneys present at the two meetings with Mrs. Clinton at issue in this case were members of the District of Columbia Bar. District of Columbia Rule of Professional Conduct 1.6(i) ("Confidentiality of Information") provides that "[t]he client of the government lawyer is the agency that employs the lawyer."

[5] "The general rule is not disputed, that confidential communications between client and attorney, are not to be revealed at any time." *Id.*

States, 449 U.S. 383, 393 (1981): "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *See also Jaffee v. Redmond*, ___ U.S. ___, 116 S. Ct. 1923, 1932 (1996) ("Making the promise of [a therapist's] confidentiality contingent . . . would eviscerate the effectiveness of the privilege.").

3. The decision below disregards the compelling need for personal and governmental lawyers to consult in a situation where a person with official responsibilities is under partisan attack and faces investigation by Congress, administrative agencies, and one or more independent counsel. Courts have construed broadly the kinds of "common interest" that allow separate lawyers to consult confidentially without destroying the attorney-client privilege.[6] Most often, a common interest is recognized where two or more clients face the same adversary or are

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[6] The rule enables counsel for clients with a common interest to exchange privileged communications and attorney work product in order to provide more effective representation:

> Whether an action is ongoing or contemplated, whether the jointly interested persons are defendants or plaintiffs, and whether the litigation or potential litigation is civil or criminal, the rationale for the joint defense rule remains unchanged: persons who share a common interest in litigation should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims.

In re Grand Jury Subpoenas, 89-3 & 89-4, 902 F.2d 244, 249 (4th Cir. 1990).

involved in the same investigation.[7] The interests of the two clients need not be identical, and they may even be adverse in some respects or at some future date, but the privilege is recognized so long as the clients share some common interest at the time of the communication.[8] In this case, of course, there is simply one person with both a private status and an official status as part of a government entity represented by government counsel.

The district court found that the consultations here "took place in the midst of several investigations and legal proceedings of an adversarial nature." Pet. App. 75a (footnote omitted). Personal and official lawyers, each enjoying a privileged relationship with their client (respectively, Mrs. Clinton and the Office of the President), attended these two meetings, and the district court concluded that "it cannot be said that Mrs. Clinton was unreasonable in seeking the advice of counsel in both her personal and official capacity."[9] *Ibid.*

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[7] *See, e.g., Haines v. Liggett Group, Inc.*, 975 F.2d 81, 94 (3d Cir. 1992); *Continental Oil Co. v. United States*, 330 F.2d 347, 349-50 (9th Cir. 1964); *Chan v. City of Chicago*, 162 F.R.D. 344, 345-46 (N.D. Ill. 1995); *In re Grand Jury Subpoena Duces Tecum Dated Nov. 16, 1974*, 406 F. Supp. 381, 389-92 (S.D.N.Y. 1975). The common interest rule applies when one set of lawyers represents a government agency and the other group represents a private party. *See, e.g., United States v. AT&T*, 642 F.2d 1285, 1300-01 (D.C. Cir. 1980) (document sharing between Department of Justice lawyers and MCI lawyers held protected).

[8] The shared interest which the privilege protects may be "legal, factual, or strategic in character." *Restatement (Third) of the Law Governing Lawyers § 126 cmt. e (Proposed Final Draft No. 1, 1996).*

[9] The district court also pointedly observed:

The common interest privilege is particularly important in the case of a person with official responsibilities because there is a need for confidential and frank communication between government and personal counsel[10] to determine the bounds of the individual's official responsibilities and thus which lawyers should be undertaking which tasks.

4. The result of the opinion below will be to force prudent personal counsel to advise their governmental clients not to speak with governmental attorneys. It is simply impossible to predict what individual or statements may one day become relevant to an independent counsel's inquiry, or what possible use an independent counsel might seek to make of statements previously made. Such advice not to speak to government counsel, needless to say, would create an excruciating dilemma for government employees who may have an obligation to provide information to their employer.

> Indeed, the Independent Counsel implicitly acknowledged the dual nature of Mrs. Clinton's legal identity when both personal and White House lawyers were present at each of her three interviews conducted at the White House by the Independent Counsel. The Independent Counsel did not object to the presence of White House lawyers at these interviews and, in fact, negotiated the terms of the interviews with both sets of counsel.

Pet. App. 75a. The IC's sudden determination that there was no attorney-client privilege available to the Office of the President was made late in the day, for reasons that remain inscrutable.

[10] The district court recognized the need for a privilege umbrella to protect discussions about which lawyers should most appropriately undertake what tasks: "[I]t is not always clear whether personal counsel or White House Counsel's Office attorneys representing the Office of the President should undertake various legal assignments." Pet. App. 74a.

If the advice is followed, the consequence will be to deny useful information to government counsel and impair the ability of government counsel to render fully informed legal advice to the client. As this Court recognized in *Upjohn*, the attorney-client privilege exists not only to protect the giving of professional advice to a client but also to protect "the giving of information to the lawyer to enable him to give sound and informed advice." 449 U.S. at 390.[11]

5. Attorneys for the Office of the President and Mrs. Clinton reasonably believed their communications were privileged, and for that reason they should be protected from disclosure. The district court held that there was a reasonable expectation of confidentiality "based as it was on communications with licensed attorneys and in the midst of adverse legal proceedings."[12] Pet. App. 76a.

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[11] In *Trammel v. United States*, 445 U.S. 40, 51 (1980), the Court recognized that "[t]he lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out."

[12] The court below mischaracterized both the district court's holding and Mrs. Clinton's position with respect to the reasonable expectations of the persons at the two meetings. The court of appeals stated that "[b]ecause Mrs. Clinton does not claim that she believed that the White House lawyers represented her personally, her argument must be that she believed that the law sweeps broadly enough to cloak these conversations within the attorney-client privilege." Pet. App. 24a (footnote omitted). The point is that Mrs. Clinton quite reasonably believed that the White House counsel were present to obtain information and give advice to the Office of the President of which she and they reasonably and correctly understood her to be a part. The point is not (as the court below asserted) that subjective belief can "transform an otherwise unprivileged conversation into a privileged one." *Ibid.* It is well established, as the district court found (Pet. App. 76a), that when there is a *reasonable* belief on the part of a putative client that the conversation he or she is

6. The attorney notes at issue here would not have been created but for the expectation of all those attending the meetings that the communications would remain privileged. The IC is therefore in no different a position with the privilege than he would be without it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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having is a privileged one, the conversation will be protected because, under such circumstances, "the client should not be compelled to bear the risk" that the conversation is not privileged, *United States v. Boffa*, 513 F. Supp. 517, 523 (D. Del. 1981). The reasonableness evaluation "is determined from the perspective of the client," *Griffith v. Davis*, 161 F.R.D. 687, 694 (C.D. Cal. 1995), and an attorney-client relationship may be recognized even between a private citizen and a government lawyer, *United States v. Schaltenbrand*, 930 F.2d 1554, 1562-63 (11th Cir. 1991).

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In the Supreme Court of the United States

OCTOBER TERM, 1996

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v.

OFFICE OF INDEPENDENT COUNSEL, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Section 535(b) of Title 28 requires that a federal government agency expeditiously provide to federal law enforcement authorities "[a]ny information" relating to federal criminal violations. The question presented is whether, in light of Section 535(b), a federal government agency may withhold relevant information subpoenaed by a federal grand jury.

2. If Section 535(b) does not apply, a second question presented is whether, under Federal Rule of Evidence 501, a federal government agency may rely on a governmental attorney-client or work product privilege to withhold relevant information subpoenaed by a federal grand jury.

3. If a federal government agency can maintain governmental attorney-client and work product protections in federal grand jury proceedings, a third question presented is whether petitioner has satisfied the requirements of those protections.

PARTIES TO THE PROCEEDING

The parties to the proceeding are the United States, represented in this criminal investigation by the Independent Counsel In re: Madison Guaranty Savings & Loan Association, see 28 U.S.C. 594(a); the White House Office, which has referred to itself "[f]or convenience" as the "Office of the President" since its September 30, 1996, brief in the district court; and Hillary Rodham Clinton, who was an intervenor in the court of appeals and who has filed a response in support of the petition for a writ of certiorari.

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-61a) is not yet reported. The opinion of the district court (Pet. App. 62a-83a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1997. The petition for a writ of certiorari was filed on May 12, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On August 5, 1994, pursuant to the application of Attorney General Reno under 28 U.S.C. 592(c), the United States Court of Appeals for the District of Columbia Circuit, Division for the Purpose of Appointing Independent Counsels, appointed Kenneth W. Starr as Independent Counsel to represent the United States in investigating and prosecuting matters "relating in any way to

James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings and Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc." *In re Madison Guaranty Savings & Loan Association*, at 2 (D.C. Cir. Spec. Div. Aug. 5, 1994).

Madison Guaranty was a federally insured savings and loan in Little Rock, Arkansas, operated by James B. McDougal and Susan H. McDougal. Hillary Rodham Clinton performed work for Madison in her capacity as an attorney at the Rose Law Firm in Little Rock. Capital Management Services was a federally licensed small business investment company in Little Rock operated by David L. Hale, a Little Rock judge and businessman. Whitewater Development Company was a real estate venture owned by the McDougals and the Clintons. David Hale, James McDougal, Susan McDougal, and nine other individuals have been convicted of federal crimes during this investigation.[1]

This Office has investigated events occurring in the aftermath of the July 20, 1993, death of former Deputy White House Counsel Vincent W. Foster, Jr., including the handling of documents from his White House office. Bates Decl. ¶ 2(App. 16).[2] On July 22, 1993, Whitewater-related documents (along with others) were transferred from Mr. Foster's office in the White House's West Wing to a room on the third floor of the White House Residence.

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[1] On March 22, 1994, Hale pled guilty to a two-count felony information. On May 28, 1996, the McDougals were convicted by jury verdict, along with the then-Governor of Arkansas Jim Guy Tucker. The jury found James McDougal guilty of 18 felony counts including conspiracy, bank fraud, misapplication, false entry, and mail fraud. The jury found Susan McDougal guilty of four felony counts including mail fraud, misapplication, false entry, and false statements. The jury found Tucker guilty of one count of conspiracy and one count of mail fraud.

[2] The citations to "App." refer to Appellant's Appendix in the court of appeals.

On July 27, 1993, documents that had been in Mr. Foster's office and stored on the third floor of the Residence were taken from the Residence to the Clintons' personal lawyers.

This Office also has investigated the circumstances surrounding the discovery of certain copies of Rose Law Firm billing records that reflect Mrs. Clinton's legal work for Madison (and contain handwritten notes of Mr. Foster). Bates Decl. ¶ 2 (App. 16). The records, which were responsive to a May 1994 grand jury subpoena to Mrs. Clinton, were produced to this Office by Mrs. Clinton's personal attorney in January 1996. White House aide Carolyn Huber publicly testified that she found the copies (the originals have never been produced) on the third floor of the White House Residence in August 1995; placed them in a box without realizing exactly what they were; and then discovered the records in her East Wing office in January 1996.

2. This Office has sought numerous documents by grand jury subpoena from the Executive Office of the President and its constituent parts, including the White House Office. This Office informed the White House in March 1995—*before either of the two sets of notes at issue here were created*—that we did not accept the proposition that governmental attorney-client or work product privileges authorized the White House to withhold relevant information from the grand jury. Bates Decl. ¶ 10 (App. 17-18).

Among the documents sought during the course of the criminal investigation have been notes taken by White House officials (including White House attorneys) during meetings or interviews with personnel who were participants in or witnesses to events under criminal investigation. *The White House has produced White House attorneys' notes of their meetings with numerous White House officials.* For example, the White House produced notes taken by White House attorneys during meetings with former White House Counsel Bernard Nussbaum

and Assistant to the President Margaret Williams regarding the handling of documents from Mr. Foster's office in the wake of his death. Bates Decl. ¶ 12 (App. 18). In addition, as is publicly known, White House attorneys have testified before the grand jury about their work.

3. The grand jury subpoena here was issued after this Office learned of certain meetings in 1995 and 1996 between Mrs. Clinton and White House attorneys. It required production of documents reflecting those meetings to the extent they related to subjects including Madison, Whitewater, James B. McDougal, David L. Hale, or Vincent W. Foster, Jr. App. 3. The White House identified nine sets of responsive documents but refused production, interposing claims of Executive privilege, attorney-client privilege, and work product. App. 7-12.

4. On August 19, 1996, this Office filed a motion to compel production of two sets of documents: (1) notes taken by Associate White House Counsel Miriam Nemetz on July 11, 1995, at a meeting with Mrs. Clinton, Special White House Counsel Jane Sherburne, and Mrs. Clinton's personal attorney David Kendall; and (2) notes taken by Ms. Sherburne at meetings with Mrs. Clinton on January 26, 1996, which were also attended by Mr. Kendall and his partner Nicole Seligman, and in part by Jack Quinn, then the White House Counsel. App. 13; Sherburne Decl. ¶¶ 16, 20 (Pet. App. 89a, 90a). The July 11, 1995, notes relate to Mrs. Clinton's activities in the aftermath of Mr. Foster's death. Sherburne Decl. ¶ 16 (Pet. App. 89a). The January 26, 1996, notes relate to Mrs. Clinton's testimony about the Rose Law Firm billing records reflecting Mrs. Clinton's work for Madison. Sherburne Decl. ¶¶ 18-20 (Pet. App. 89a-90a).[3]

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[3] Mrs. Clinton was questioned by this Office at the White House on July 22, 1995. She was questioned before the grand jury on January 26, 1996. In the district court, this Office set forth why the subpoenaed notes were relevant, and offered to make a further submission in camera.

The parties disputed whether a federal government agency can maintain *governmental* attorney-client and work product protections to withhold relevant information in federal grand jury proceedings.[4] The district court issued its decision on November 26, 1996. Although noting that "[t]he issues in this case have been complicated somewhat by the manner in which the White House Counsel's office has defined its area of responsibility," Pet. App. 75a n.7, the court did not address the fundamental privilege issue. Relying instead on a narrow, factbound argument advanced by Mrs. Clinton, the district court accepted the privilege claim, basing its conclusion on "the reasonable belief of the White House and Mrs. Clinton that the communications were privileged and by the fact that the notes are attorney work product." *Id.* at 82a.

5. The court of appeals reversed. Pet. App. 1a-61a. The court began with Federal Rule of Evidence 501, which states that privileges in federal proceedings are "governed by the principles of the common law as they may be interpreted * * * in the light of reason and experience." *Id.* at 5a. Privileges "are not lightly created nor expansively construed" under Rule 501, for they "are in derogation of the search for truth." *Id.* at 12a (quoting *United States* v. *Nixon,* 418 U.S. 683, 710 (1974)).

Turning to the question presented, the court observed that the decision in "*Nixon* is indicative of the general principle that the government's need for confidentiality may be subordinated to the needs of the government's own criminal justice processes." Pet. App. 15a. The court rejected the White House's argument that, notwithstanding *Nixon,* a government agency is entitled to the same evidentiary privileges as a private corporation. The court noted several important differences betwen the government and private organizations, including that the

[4] Without explanation, the White House withdrew its claim of Executive privilege on September 30, 1996.

actions of White House personnel "cannot expose the White House as an entity to criminal liability," and that "executive branch employees, including attorneys, are under a statutory duty to report" information relating to criminal violations. *Id.* at 17a (citing 28 U.S.C. 535(b)).

The court also found that the "general duty of public service calls upon government employees and agencies to favor disclosure over concealment." Pet. App. 17a. The court of appeals noted, in this regard, that the Supreme Court had rejected a proposed privilege for accountants because of their "*public* responsibility" and "public obligations." *Id.* at 17a-18a (quoting *United States* v. *Arthur Young & Co.*, 465 U.S. 805, 817-818 (1984)). The court of appeals explained that "[t]he public responsibilities of the White House are, of course, far greater than those of a private accountant performing a service with public implications." Pet. App. 18a. The court added:

> [T]he strong public interest in honest government and in exposing wrongdoing by public officials would be ill-served by recognition of a governmental attorney-client privilege applicable in criminal proceedings inquiring into the actions of public officials. We also believe that to allow any part of the federal government to use its in-house attorneys as a shield against the production of information relevant to a federal criminal investigation would represent a gross misuse of public assets.

Ibid.

The court similarly concluded that a governmental work product protection, like the governmental attorney-client privilege, could not shield the notes from the grand jury. Pet. App. 25a-27a. Finally, the court rejected the district court's analysis, stating that "we know of no authority, and Mrs. Clinton has cited none, holding that a client's beliefs, subjective or objective, about the law of privilege can transform an otherwise unprivileged conversation into a privileged one." *Id.* at 24a.

District Judge Kopf, sitting by designation, dissented. He agreed that the White House's argument for an absolute attorney-client privilege was inconsistent with this Court's decision in *Nixon*, which "teaches that the President's general need for confidentiality (expressed here by the attorney-client privilege) is outweighed by a grand jury's need for evidence of the truth." Pet. App. 51a. He concluded that "it is a reasonable extension of *Nixon* to pierce the organizational attorney-client privilege asserted by the White House," *id.* at 57a, and "[t]he same analysis justifies piercing the work product 'privilege,'" *id.* at 51a n.4. Under the particular facts, however, Judge Kopf would have applied the decision prospectively only, and thus would have affirmed the judgment of the district court. *Id.* at 60a-61a.

ARGUMENT

The legal issue before the Court is one of first impression in the federal courts. Not only is there no circuit conflict, but only three federal judges—the court of appeals panel in this case—have addressed the question.[5] Significantly, all three judges rejected petitioner's argument for blanket governmental attorney-client and work product privileges in federal criminal proceedings.

The issue is exceedingly narrow. The case presents only the application, in this particular grand jury setting, of Federal Rule of Evidence 501 and 28 U.S.C. 535(b).[6] The petition raises no constitutional question. Nor does the case concern the availability or scope of governmental privileges in civil or congressional proceedings, or under the Freedom of Information Act.

What the case presents, at bottom, is a bold assertion of a *governmental* privilege against a federal grand jury's interest in securing relevant evidence. The decision of

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[5] The district court did not address this issue.

[6] Federal Rule of Evidence 501 and 28 U.S.C. 535(b) are set out in an appendix to this brief.

the court of appeals rejecting that assertion is thoroughly and soundly grounded in law and public policy. To grant plenary review when the case law is so sparse (and the decision of the court of appeals so well-reasoned) not only would represent a departure from the Court's customary practice, it would occasion further delay in sensitive grand jury proceedings in which the national interest would be served by the uninterrupted completion of the criminal justice process.

For those reasons, the petition should be denied.

I

1. At the outset, we note the obvious: This Court's review would delay a highly sensitive criminal investigation; indeed, several parts of the investigation could remain frozen for an additional three to twelve months. "[D]elay is fatal to the vindication of the criminal law." *Cobbledick* v. *United States*, 309 U.S. 323, 325 (1940). That is especially true in the investigative stage. Because "extended litigation" impedes the "orderly progress of an investigation," *United States* v. *Calandra*, 414 U.S. 338, 349 (1974), and "frustrate[s] the public's interest in the fair and expeditious administration of the criminal laws," *United States* v. *R. Enterprises, Inc.*, 498 U.S. 292, 299 (1991), federal courts attempt to avoid the "protracted interruption of grand jury proceedings," *Calandra*, 414 U.S. at 349-350.

2. In any event, the dictates of this Court's Rule 10 counsel strongly against review at this time. Not only is there no circuit conflict, but in only one reported case before this dispute, so far as the parties are aware, has the issue even arisen.[7] The novelty of the issue in the

[7] The issue in that case involved a state agency; the court of appeals did not analyze the privilege issue, but instead remanded for consideration of the application of state sunshine laws. See *In re Grand Jury Subpoena*, 886 F.2d 135 (6th Cir. 1989). One intermediate state court decision addressed a similar issue under *state* law, but the case involved a private law firm retained by a

courts counsels hesitation before this Court exercises its discretionary certiorari jurisdiction. See *Lackey* v. *Texas*, 115 S. Ct. 1421, 1421-1422 (1995) (Stevens, J., respecting denial of certiorari) ("importance and novelty" of a question with "potential for far-reaching consequences" provide "principled basis for postponing consideration of the issue until after it has been addressed by other courts").

3. Not only is the issue novel in the courts, it is extraordinarily narrow. The question here concerns *governmental* attorney-client and work product protections in federal *criminal* proceedings. See Fed. R. Evid. 501, 1101(c), (d). The issues *not* presented include the following:

First, the case raises no issue regarding the application of government attorney privileges in *civil* proceedings. See Pet. App. 5a.[8] The court of appeals' decision is entirely consistent with recognition of governmental attorney-client and work product privileges in federal civil proceedings,[9] where the government is opposed to a private party and where evidentiary privileges generally carry more weight. Cf. *United States* v. *Nixon*, 418 U.S. 683, 712 n.19 (1974).

Second, because Rule 501 does not apply to congressional proceedings, the case implicates no question re-

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state agency, not government attorneys who were public employees, a distinction of importance under state law. See *In re Grand Jury Subpoenas Duces Tecum*, 574 A.2d 449, 455 (N.J. Super. Ct. App. Div. 1989). See also Pet. App. 8a-10a.

[8] Nor is any issue presented regarding the scope of a criminal defendant's discovery from the Government. Such discovery is governed by settled principles under Fed. R. Crim. P. 16, Fed. R. Crim. P. 26.2, 18 U.S.C. 3500, *Brady* v. *Maryland*, 373 U.S. 83 (1963), and *Giglio* v. *United States*, 405 U.S. 150 (1972).

[9] That includes proceedings under the Freedom of Information Act (FOIA), in which government agencies can withhold documents based on the civil litigation privileges ordinarily available to private parties. 5 U.S.C. 552(b)(5).

garding the scope of the privileges that a government agency (or an individual) can maintain in congressional proceedings.[10]

Third, the case presents no question as to the scope of the privileges that an individual or private corporation can maintain in any proceedings, civil or criminal.

Fourth, no constitutional issue is presented. Indeed, because the question involves the application of a federal statute and a federal rule of evidence, Congress can further study the issue and address it legislatively at any time.

Fifth, petitioner has not challenged the jurisdiction or authority of this Office to represent the United States in conducting this criminal investigation. See 28 U.S.C. 594(a), 596(a)(1). Nor has petitioner asked the Court to reconsider *Morrison* v. *Olson*, 487 U.S. 654 (1988), or raised any issue of separation of powers.

Finally, petitioner has not raised the question whether Mrs. Clinton's asserted expectation about the law was sufficient to render the communications privileged, which was the basis for the district court's decision. Petitioner also has not raised the question of possible prospective-only application, which in the end was the main issue on which the dissenting judge disagreed with the panel majority in the court of appeals. Hence, those two issues are not before this Court. See Sup. Ct. R. 14.

4. Petitioner indicates that it seeks review because an important principle is at stake, not because of these notes. See Pet. 9-10. The undisputed record belies such a claim. The White House has produced reams of attorney notes virtually identical to those at issue here, *including attorney notes addressing the same subject matters.* Bates Decl.

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[10] Congress recognizes privileges as required by the Constitution or pursuant to its own rules and practices under its Article I authority. See S. Rep. No. 104-191, at 11-12 (1995).

¶ 12 (App. 18).[11] The only difference here is that these notes reflect communications with Mrs. Clinton. Petitioner has explained that distinction by saying simply that White House attorneys' documents have been disclosed when that "could be accomplished without compromising important governmental interests." Sherburne Supp. Decl. ¶ 3 (App. 31). The explanation is untenable: No principle, no governmental interest, justifies releasing attorneys' notes of communications with government officials such as Bernard Nussbaum and Margaret Williams *and* simultaneously withholding attorneys' notes of communications with Mrs. Clinton—given that all of the notes concern the same subject matter.

II

The decision of the court of appeals is correct. It is dictated by four separate sources of law: Section 535(b) of Title 28, traditional considerations under Federal Rule of Evidence 501, this Court's precedent (particularly *United States* v. *Nixon*), and compelling public policies.

1. Federal Rule of Evidence 501 provides that privileges in federal proceedings are "governed by the principles of the common law as they may be interpreted * * * in the light of reason and experience" except, *inter alia*, as "provided by Act of Congress." Here, Section 535(b) of Title 28 imposes a specific disclosure obligation on Executive Branch employees that requires rejection of petitioner's common-law privilege claim. The statute provides:

> Any information, allegation, or complaint received in a department or agency of the executive branch of the Government relating to violations of title 18 involving Government officers and employees shall be expeditiously reported to the Attorney General by the head of the department or agency * * *.

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[11] The technical question whether petitioner waived the privilege as to these notes was complicated, however, because attorneys for two clients were present for the communications. See *John Morrell & Co.* v. *Local Union 304A*, 913 F.2d 544, 556 (8th Cir. 1990).

28 U.S.C. 535(b) (originally enacted as Act of Aug. 31, 1954, ch. 1143, § 1, 68 Stat. 998, 998). Labeling the statute "significant," the court of appeals stated that "executive branch employees, *including attorneys*," have a duty to report information relating to criminal wrongdoing. Pet. App. 17a (emphasis added).[12]

a. The language of the statute is clear and all-encompassing. It admits of no distinction between information obtained by government attorneys and that obtained by other government employees. See *International Longshoreman's Ass'n* v. *Allied Int'l, Inc.*, 456 U.S. 212, 225 (1982) ("[i]n the absence of any limiting language in the statute or legislative history, we find no reason to conclude that Congress intended such a potentially expansive exception to a statutory provision").

In addition, Congress' inclusion of a specific exception for "class[es] of information" as to which the Attorney General "directs otherwise," 28 U.S.C. 535(b)(2), confirms that the statute means what it says and says what it means—and that no further exceptions should be judicially inferred or created. See *United States* v. *Smith*, 499 U.S. 160, 167 (1991) ("Congress' express creation of these two exceptions convinces us that the Ninth Circuit erred in inferring a third exception"); *Honig* v. *Doe*, 484 U.S. 305, 325 (1988) (Court "not at liberty to engraft onto the statute an exception Congress chose not to create").[13]

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[12] The information sought by the grand jury "involv[es] Government officers and employees." 28 U.S.C. 535(b). The notes here are relevant to the grand jury's investigation of several present or former White House officers and employees.

[13] Similarly, in *University of Pensylvania* v. *EEOC*, 493 U.S. 182 (1990), Title VII provided for government access to information relevant to a discrimination charge. A university argued for a "privilege" exception for academic peer review materials. The Court rejected the claim, stating that the Title VII provisions "[o]n their face * * * do not carve out any special privilege relating to peer review materials." *Id.* at 191.

b. The legislative history confirms and strengthens that conclusion. The House Committee Report accompanying Section 535 states that "[t]he purpose" of the provision is to "require the reporting by the departments and agencies of the executive branch to the Attorney General of information coming to their attention concerning *any alleged irregularities* on the part of officers and employees of the Government." H.R. Rep. No. 83-2622 (1954) (emphasis added), *reprinted in* 1954 U.S.C.C.A.N. 3551, 3551. The report emphasizes that "[i]f the Attorney General or the Federal Bureau of Investigation undertakes such investigation, they should have *complete cooperation* from the department or agency concerned." *Id.* at 3552 (emphasis added). The Justice Department supported the legislation. Then-Deputy Attorney General Rogers expressed the Department's views as follows:

> The Department of Justice urges the prompt enactment of the measure, for such legislation will emphasize the congressional intent that the chief law-enforcement officer of the Government is to have *free access* to all units thereof for the purpose of ferreting out personnel criminally violating their trusts and oaths of office.

Id. at 3553 (emphasis added).[14]

c. This analysis is also consistent with traditional understandings. For example, Lloyd N. Cutler, who has served as White House Counsel in two Administrations, has remarked that there can be "problems relating to misconduct that you learn about somewhere in the White House or elsewhere in the Government." Cutler, *The Role of the Counsel to the President of the United States*, in The Record of the Association of the Bar of the City of New York, Vol. 35, No. 8, at 470, 472 (1980). Mr. Cutler noted that there is a "rule of making it your duty, *if you're a Government official as we as lawyers are, a*

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[14] "When issuing [grand jury] subpoenas, an independent counsel stands in the place of the Attorney General." S. Rep. No. 100-123, at 22 (1987); see 28 U.S.C. 594(a).

statutory duty to report to the Attorney General any evidence you run into of a possible violation of a criminal statute." *Ibid.* (emphasis added). Mr. Cutler further remarked that "[w]hen you hear of a charge and you talk to someone in the White House * * * about some allegation of misconduct, almost the first thing you have to say is, 'I really want to know about this, but anything you tell me I'll have to report to the Attorney General.'" *Ibid.*[15]

d. In addition, federal regulations require each agency to have a "designated ethics official," generally an attorney, to provide ethics counseling to employees. 5 C.F.R. 2635.107. The regulations state: "Disclosures made by an employee to an agency ethics official are not protected by an attorney-client privilege. An agency ethics official is required by 28 U.S.C. 535 to report any information he receives relating to a violation of the criminal code, title 18 of the United States Code." *Ibid.*

e. In attempting to avoid the import of Section 535(b) during this litigation, petitioner has advanced several arguments "reminiscent not of jurists such as Hale, Holmes, and Hughes, but of escape artists such as Houdini." *United Steelworkers of America* v. *Weber*, 443 U.S. 193, 222 (1979) (Rehnquist, J., dissenting). Here, petitioner inters the statute in a footnote, noting (without any explanation) two arguments. See Pet. 22-23 n.7.[16]

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[15] Similarly, petitioner has previously acknowledged these disclosure obligations. The 1993 White House report on the Travel Office episode stated that "White House personnel may find that they have information about a *possible* violation of law. If there is a reasonable suspicion of a crime * * * about which White House personel *may have* knowledge, the initial communication of this information should be made to the Attorney General, the Deputy Attorney General, or the Associate Attorney General." White House Travel Office Management Review 23 (July 2, 1993) (emphases added).

[16] It is not disputed that the Executive Office of the President and the component White House Office are covered by Section 535. See

First, petitioner refers generally to the "legislative history" of Section 535. Pet. 22 n.7. As noted above, however, the legislative materials strongly support the text.

Second, petitioner cites several unpublished Office of Legal Counsel (OLC) memoranda. But those memoranda have no application here. Under authority delegated by the statute, the Attorney General has authorized an exception to Section 535(b) for information obtained by government attorneys who, pursuant to a specific regulation (28 C.F.R. 50.15), represent employees in their *personal* capacities—for example, in civil suits alleging *Bivens* violations. The OLC memoranda cited by petitioner address only the exception for these *personal* representations.[17] The Justice Department regulation and the OLC memoranda do not (and do not purport to) apply to situations where a government attorney represents a *government agency* and learns information during the course of her *official* representation of that agency.[18]

Pet. 22-23 n.7; W.H. Br. 40-43 (filed in 8th Cir. Jan. 30, 1997); W.H. Supp. Br. 7-8 (filed in E.D. Ark. Nov. 6, 1996; under seal); U.S. Supp. Br. 9-12 (filed in E.D. Ark. Nov. 6, 1996; under seal).

[17] See OLC Mem. of Mar. 29, 1985, at 5 (analyzing duty under 50.15 and 535(b) of an Assistant U.S. Attorney who discovered information while representing *Bivens* defendants); OLC Mem. of Apr. 3, 1979, at 1 (addressing question regarding "propriety of providing Justice Department representation in a civil suit to a government employee"); OLC Mem. of Aug. 30, 1978, at 4 (analyzing under 50.15 and 535(b) the "contours of the relationship between a Department attorney and an individual government employee whose representation has been undertaken"); OLC Mem. of Nov. 30, 1976, at 1 (addressing question regarding situation where "[t]he U.S. Attorney's Office is currently representing both a Federal employee and the United States as defendants in a civil suit for damages").

[18] Cf. 6 Op. Off. Legal Counsel 626, 627 (1982) (stating, in context of proposal for certain kinds of inspector general investigations, that "evidence of criminal conduct 'uncovered' during the course of an investigation, will be referred directly to the Department of Justice, *as is required by 28 U.S.C. § 535*"). OLC is well-versed in the crucial distinction between representation of the

The court of appeals correctly stated that the OLC memoranda deal with representations of individuals pursuant to 28 C.F.R. 50.15 and that "[n]o such personal attorney-client relationship exists between Mrs. Clinton and the White House attorneys." Pet. App. 19a n.10.[19]

In this case, in sum, the grand jury subpoena requires disclosure unless a valid privilege applies. Because petitioner's common-law privilege claim is contravened by Section 535(b), the notes must be produced.

2. Even if Section 535(b) were erased from the United States Code, petitioner's claim would fail under traditional Rule 501 privilege analysis. Federal courts are deeply committed to the principle that "the public has a right to every man's evidence," *Jaffee* v. *Redmond*, 116 S. Ct. 1923, 1928 (1996) (quotation omitted)—a principle "particularly applicable to grand jury proceedings," *Branzburg* v. *Hayes*, 408 U.S. 665, 688 (1972). Because testimonial privileges "obstruct the search for truth," there is a "presumption against the existence of an asserted testimonial privilege." *Id.* at 690 n.29, 686. Privileges thus "are not lightly created nor expansively construed." *Nixon*, 418 U.S. at 710.

In light of those settled principles, this Court has recognized common-law privileges, or applied them in a particular setting, only when the privilege (or application thereof) is historically rooted or recognized in the vast majority of the States—and is justified by overriding public policy considerations. See Pet. App. 12a-13a. Here, the roots are nonexistent; to the contrary, the parties have found no case, statute, rule, or agency opinion suggesting that a

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personal interests of a government employee and representation of the governmental interests of a government agency. See, *e.g.*, 4B Op. Off. Legal Counsel 749, 751 (1980) (distinguishing between representation of personal interests and governmental interests).

[19] White House attorneys did not represent Mrs. Clinton in her personal capacity. See Sherburne Decl. ¶¶4, 7-10, 17, 21 (Pet. App. 84a-90a); Kendall Aff. ¶¶ 2-3 (Pet. App. 92a-93a). Such representation is not authorized. See 3 U.S.C. 105(a)(1); 28 C.F.R. 50.15 (a)(4); 4B Op. Off. Legal Counsel 749, 753 (1980).

department or agency of the United States (or any state governmental entity) can maintain a governmental attorney-client or work product privilege in federal criminal or grand jury proceedings.[20] Nor are we aware of a contemporary *state* case, law, or rule adopting such privileges for public attorneys in the criminal context.

The practice of Executive Branch agencies further suggests that the application of the privilege is not rooted in historical practice or contemporary understandings. In the Iran-Contra investigation, for example, White House and other government lawyers provided extensive information about their conversations with the President and other government officials. See, *e.g.*, Final Report of the Independent Counsel for Iran/Contra Matters, Vol. I, at 44, 346-348, 366-368, 470 n.137, 474-479, 517, 520, 536 & nn.116 & 117 (Aug. 4, 1993). What is more, in this very investigation, the White House and other Executive Branch agencies have disclosed considerable information that, under petitioner's argument, is protected by attorney-client or work product privilege.

Consistent practice, coupled with the absence of any authority supporting petitioner, refutes the claim that a governmental attorney-client or work product privilege has traditionally been understood to justify withholding relevant information from the federal criminal process. Cf. *BankAmerica Corp.* v. *United States*, 462 U.S. 122, 131 (1983) ("Government's failure for over 60 years to exercise the power it now claims * * * strongly suggests that

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[20] Petitioner cites a 1982 OLC opinion, see 6 Op. Off. Legal Counsel 481 (1982), but as the court of appeals indicated, that OLC opinion says nothing about the application of governmental common-law privileges in federal criminal procedings. See Pet. App. 18a n.10. Even for purposes of congressional inquiries, moreover, OLC has stated that "communications between the Attorney General, his staff, and other Executive Branch 'clients' that might otherwise fall within the common law attorney-client privilege should be analyzed in the same fashion as any other intra-Executive Branch communications." 10 Op. Off. Legal Counsel 68, 78 (1986).

it did not read the statute as granting such power"). The total absence of historical or contemporary support for petitioner's position demonstrates that the privilege claim in this context is a latter-day contrivance that warrants rejection. Cf. *University of Pennsylvania* v. *EEOC*, 493 U.S. 182, 195 (1990); *Branzburg*, 408 U.S. at 685-687.

3. In addition, as all three judges on the court of appeals panel concluded, petitioner's argument contravenes this Court's decision in *Nixon*. The decision in *Nixon* held that the Executive privilege for Presidential communications—a privilege that is constitutionally based, historically rooted, and "fundamental to the operation of Government," 418 U.S. at 708—was overcome by the need for relevant evidence in criminal proceedings. *Nixon* leads inexorably to the conclusion that a governmental attorney-client or work product assertion similarly must yield to the need for relevant evidence in criminal proceedings. See Pet. App. 15a; accord *id.* at 51a, 57a (Kopf, J., dissenting). It is untenable as a matter of federal common law to say that communications between a President and his closest advisors (subject to a deeply rooted constitutional and common-law privilege "fundamental to the operation of Government") are *less* worthy of protection in criminal proceedings than are communications between any government employee and government attorney (as to which there is neither historical nor contemporary support for the privilege application).

Petitioner suggests that the personal attorney-client privilege exists in criminal proceedings notwithstanding *Nixon*, so why not a governmental attorney-client privilege? Pet. 22. That argument would have force only if there were *no* differences between public and private entities for purposes of common-law privileges in criminal proceedings. But those differences do exist, and they are of profound relevance to a reasoned analysis of the issues presented. Indeed, this Court has firmly rejected the suggestion that the common law of privileges takes no account of the different responsibilities of public and private

entities. In declining to apply a privilege to an accountant's workpapers, the Court emphasized:

> The *Hickman* work-product doctrine was founded upon the private attorney's role as the client's confidential advisor and advocate, a loyal representative whose duty it is to present the client's case in the most favorable possible light. * * * [T]he independent auditor assumes a *public* responsibility transcending any employment relationship with the client. * * * This "public watchdog" function demands that the accountant maintain total independence from the client at all times *and requires complete fidelity to the public trust.* To insulate from disclosure a certified public accountant's interpretations of the client's financial statements would be to ignore the significance of the accountant's role as a disinterested analyst charged with *public* obligations.

United States v. *Arthur Young & Co.*, 465 U.S. 805, 817-818 (1984) (emphases added). Government attorneys, far more than accountants, owe a *public* duty that is inconsistent with application of governmental attorney-client and work product privileges in federal criminal proceedings.[21]

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[21] Respected commentators and the Restatement similarly reject petitioner's equation of private corporations to public entities in this context. See 1 *McCormick on Evidence* § 87.1, at 321 (4th ed. 1992) ("where the entity in question is governmental * * *, significantly different considerations appear"); 24 Wright & Miller, *Federal Practice and Procedure* § 5475, at 126-127 (1986) ("[T]he costs of the government privilege may be very high. * * * [L]egitimate claims for governmental secrecy should all be worked out in the context of the existing privileges for secrets of state and official information."); Restatement (Third) of the Law Governing Lawyers § 124 cmt. b. (Mar. 29, 1996) ("[U]nlike persons in private life, a public agency or officer has no autonomous right of confidentiality in communications relating to governmental business."); *ibid.* ("More particularized rules may be necessary where one agency of government claims the privilege in resisting a demand for information by another. Such rules should take account of the complex considerations of governmental structure, tradition, and regulation that are involved.").

4. Even if petitioner's proposed privilege application were both (i) rooted in historical or contemporary law and (ii) consistent with this Court's precedent, petitioner still would have to demonstrate a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Jaffee*, 116 S. Ct. at 1931. The court of appeals correctly concluded that relevant policy considerations point decisively against petitioner's position.

Under petitioner's theory, a government official (including a President) could tell a White House or other agency attorney that he shredded subpoenaed documents or paid off a potential witness or erased a subpoenaed tape or concealed subpoenaed documents. An agency employee could tell an agency attorney that he had falsified his financial disclosure form or embezzled money from the agency. A prison guard might admit to a state agency attorney that he had beaten a prisoner. The possibilities are legion. Yet under petitioner's theory, such revelations of evidence of wrongdoing could be protected from disclosure to a federal grand jury.

It strains credulity to suggest that such results, in which attorneys who are *public* employees conceal information from the criminal process, are justified by a "*public* good." There is no escape from the unsettling consequence of petitioner's theory: Government agencies would be allowed to shield evidence of serious wrongdoing from the grand jury. As the court of appeals concluded, that result would flout "the strong public interest in honest government" and "would represent a gross misuse of public assets." Pet. App. 18a.[22]

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[22] As Judge Weinstein has stated: "If there is wrongdoing in government, it must be exposed. The law officer has a special obligation * * *. His duty to the people, the law, and his own conscience requires disclosure * * *." Weinstein, *Some Ethical and Political Problems of a Government Attorney*, 18 Maine L. Rev. 155, 160 (1966).

Petitioner nonetheless cites policy concerns that, it says, justify the privilege, even in federal *criminal* proceedings.[23] Petitioner contends, for example, that government attorneys must be able to obtain facts to properly perform their functions—providing advice as to privileges, gathering and producing documents, making personnel decisions, rendering public statements, and the like. Pet. 3, 16. But the interest in *gathering* facts to perform those functions in no way requires the further step of *concealing* facts from a federal grand jury if the facts are (or become) relevant to a federal criminal investigation.

Petitioner responds, however, that there might otherwise be a chilling effect on government attorneys and employees. Pet. 14-16. This is familiar argument,[24] and this

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[23] Petitioner's argument that the attorney-client privilege must apply in the same absolute manner for corporations and government entities begs the true question whether there are relevant differences between private corporations and government entities for purposes of the privilege analysis. See Pet. App. 6a. It also fails to acknowledge that there already are many context-specific privileges recognized in federal and state law. Privileges often give way in the criminal context, in particular, in recognition of the paramount importance in criminal proceedings of obtaining relevant information. See *Nixon*, 418 U.S. at 708-713 & n.19; *Branzburg*, 408 U.S. at 688; *McCormick* § 104, at 388 (some States "deny the [physician] privilege in criminal cases generally, or in felony cases, or in cases of homicide").

[24] In *every* privilege case, the proponent argues that, in the absence of the privilege, important communications would be chilled—whether it be Presidential communications, information provided by reporters' sources, academic peer review discussions, state legislator discussions, or parent-child communications. In general, federal courts have concluded that they are ill-equipped to examine the relative merits of such claims. That is why courts generally look to background principles of judicial restraint and such objective criteria as the historical or contemporary support for a privilege. See *Branzburg*, 408 U.S. at 693-694 ("Estimates of the inhibiting effect of such subpoenas on the willingness of informants to make disclosures to newsmen are widely divergent and to a great extent speculative."); Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 Sup.

Court has routinely rejected this kind of hypothesized effect as a basis for applying a privilege.[25] In addition, petitioner's chilling-effect contention—upon close examination—crumbles.

As has *always* been true, government employees and government lawyers understand that they do not control the ultimate assertion of privilege in any forum.[26] As a result, the government attorney and employee can have *no* expectation of confidentiality and *no* assurance that their communications or work product will remain confidential if called for in federal criminal proceedings. Moreover, as an historical matter, these common-law governmental "privileges" have rarely been asserted in federal grand jury proceedings, including in this investigation. Thus, government attorneys and employees necessarily know that their communications and work may be disclosed if relevant to a federal criminal investigation.[27]

Ct. Rev. 309, 361 (tracing "web of effects" from privileges is a "stupefying complex task").

[25] See *Nixon*, 418 U.S. at 712 ("We cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for" in criminal proceedings.); *Branzburg*, 408 U.S. at 693 (rejecting privilege although "argument that the flow of news will be diminished * * * is not irrational"); see also *University of Pennsylvania*, 493 U.S. at 193 (accepting that "confidentiality is important to proper functioning of the peer review process" but rejecting chilling effect as basis for privilege).

[26] The individual who is President at the time the information is sought ultimately controls the privilege. See *CFTC* v. *Weintraub*, 471 U.S. 343, 349 & n.5 (1985) (common-law privilege for entities belongs to current management, not former management).

[27] Two other facts further undercut petitioner's argument. First, the prospect of disclosure to a grand jury does not present the same kind of chilling effect as public disclosure. See *Branzburg*, 408 U.S. at 700. Second, the overwhelming majority of White House business, and federal agency work, never comes under grand jury scrutiny. See *Nixon*, 418 U.S. at 712; cf. *Branzburg*, 408 U.S. at 691.

To be sure, when government employees who are witnesses in a federal grand jury investigation choose to communicate with other

Relying on the corporate privilege, however, petitioner further suggests that, absent a privilege, government agencies might be discouraged from conducting internal fact-finding and legal work that they perform to "promote broader public interests in the observance of law." Pet. 22 (quoting *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981)). But that argument ignores the fundamental distinction between private corporations and federal agencies. If there were no corporate privilege, corporations would be discouraged from conducting internal investigations because the facts developed could be subject to immediate disclosure to a federal grand jury, thereby exposing the corporation to criminal liability. That deterrent to gathering facts and performing legal work does not exist, however, in the governmental context. Federal agencies, unlike corporations, are not subject to criminal investigation or indictment by the United States.[28] An agency cannot be adverse to the United States in a criminal prosecution.[29] When an agency becomes aware of internal wrong-

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government employees (including government attorneys) about facts under active criminal investigation, the possibility of compelled disclosure to the grand jury is necessarily higher. That raises the question, however, whether communications in those circumstances should be protected. The district court stated that "[t]he issues in this case have been complicated somewhat by the manner in which the White House Counsel's office has defined its area of responsibility." Pet. App. 75a n.7. A governmental privilege that allows White House or other agency attorneys to receive information from grand jury witnesses and communicate that information to other witnesses—with all of those communications concealed from the grand jury—is dubious at best as a policy matter. See *Branzburg*, 408 U.S. at 696-697 ("[I]t is obvious that agreements to conceal information relevant to commission of crime have very little to recommend them from the standpoint of public policy. * * * Such conduct deserves no encomium.").

[28] Petitioner suggests this conclusion would apply as well to an immunized witness, Pet. 17, but the analogy is inapt because an immunized witness can face criminal exposure for future crimes.

[29] See 4B Op. Off. Legal Counsel 749, 751 (1980) ("This Office has long held the view that the Government may not participate on both sides of a federal criminal investigation.").

doing, the agency's interest is to ferret it out, and there can be no risk of endangering a *governmental* interest by doing so and by disclosing the results to federal law enforcement authorities. Cf. 28 U.S.C. 535(b).

5. The final gambit of would-be privilege proponents is to conjure up some middle-ground privilege that can be overcome only upon an undefined showing of need or heightened relevance. So it is that petitioner now sets forth such an alternative, Pet. 26-27, an option it did not see fit to advance in the courts below.

Any such approach would render enforcement of a grand jury subpoena contingent on a judicial finding—based on a variety of factors—that the grand jury has demonstrated some specific reason for disclosure (beyond relevance) that outweighs the agency's interest in confidentiality. Such a test would require the balancing of intangibles—the grand jury's need for information and the agency's need for confidentiality—in the context of a particular investigation, generating endless rounds of time-consuming skirmishing. This Court has consistently rebuffed efforts to require this sort of showing.[30] In this

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[30] See, *e.g.*, *R. Enterprises*, 498 U.S. at 298 ("grand jury proceedings should be free of such delays" that proposed multifactor test would cause); *Branzburg*, 408 U.S. at 704-705 (under proposed heightened relevance standard, "courts would * * * be embroiled in preliminary factual and legal determinations with respect to whether the proper predicate had been laid"); see also *University of Pennsylvania*, 493 U.S. at 194 (requiring "a specific reason for disclosure * * * beyond a showing of relevance, would place a substantial litigation-producing obstacle in the way") (quotation omitted).

There also is no basis in *Nixon* for applying some heightened standard here. *Nixon* holds that even the *constitutional* Executive privilege for presidential communications yields in the face of the showing required to obtain evidence for criminal proceedings. See *United States* v. *Gillock*, 445 U.S. 360, 373 (1980) (Executive privilege does not "justify denying judicial power to secure all relevant evidence in a criminal proceeding"); *United States* v. *North*, 910 F.2d 843, 952 (D.C. Cir. 1990) (Silberman, J., concurring in part and dissenting in part) (Court in *Nixon* "does not appear to have meant anything more than the showing that satisfied Rule 17(c)").

case as well, the argument warrants rejection. As the parties have heretofore agreed, governmental attorney-client and work product privileges either are available in federal grand jury proceedings, or are not.

6. Petitioner suggests that common-law privilege claims by federal agencies normally would be resolved internally within the Executive Branch. Pet. 20-21 n.6. But the law of privileges, we submit, can have a substantial effect even on the internal negotiation process within the Executive Branch. It is much more difficult, as a practical matter, for the President to order a Justice Department prosecutor to withdraw a grand jury subpoena (or not to seek certain documents) than it is for the White House to claim reliance on a purported common-law privilege to refuse production of information to the Department. The well-reasoned decision of the court of appeals, and the important principle it reaffirms, should have a positive impact on the ability of the Justice Department to obtain relevant information from the White House in a variety of criminal investigations.[31]

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[31] As has been reported in various congressional proceedings, the White House has interposed privilege claims against the Justice Department on several occasions in the last few years. For example, the White House refused to allow Justice Department attorneys to review documents from Vincent Foster's office in the days after his death. That prompted former Deputy Attorney General Heymann, as he has testified publicly, to tell the White House Counsel that he was making a "terrible mistake," and that "you misused us." S. Rep. No. 104-280, at 68, 83 (1996). See also *id.* at 75 (Justice Department's Office of Professional Responsibility referring to "yet another example of the lack of cooperation * * * we received from the White House throughout our inquiry" on Travel Office matter); H.R. Rep. No. 104-849, at 152 (1996) (quoting memo by the head of the Justice Department's Public Integrity Section regarding Travel Office criminal investigation: "[T]he White House's incomplete production greatly concerns us because the integrity of our review is entirely dependent upon securing all relevant documents."). The House Report on the Travel Office matter states that the Justice Department's Public Integrity Section issued a grand jury subpoena to the White House in 1994, and that the White House in response claimed privilege as to 120 documents. H.R. Rep. No. 104-849, at 151-153.

III

The attorney-client privilege and work product doctrine are complementary protections that serve the client's interest in obtaining effective legal services. They stem from the same common-law source. The attorney-client privilege applies to communications between attorney and client; the work product doctrine provides qualified protection as well to factual and legal work that the attorney performs in preparing the client's case.

For the reasons stated, a *government* entity, unlike a private corporation, cannot maintain the two attorney-based protections in federal criminal proceedings. That fundamental proposition ends the case: The conclusion applies to both the attorney-client and work product issues. See, *e.g.*, Pet. App. 51a n.4 (Kopf, J., dissenting) (same analysis governs threshold question of existence of governmental attorney-client and work product doctrines in federal criminal proceedings).

IV

Were the Court to grant the petition and ultimately agree with petitioner that a government entity can maintain attorney-client and work product protections in federal criminal proceedings, two additional questions would be presented: whether the requirements of the attorney-client privilege are met under the facts of this case; and whether the requirements of the work product doctrine are met under the facts of this case. Petitioner cannot satisfy the requirements of either privilege, however, as we will briefly explain. See Sup. Ct. R. 15.2.

1. Assuming *arguendo* that a government agency can maintain a governmental attorney-client privilege in federal criminal proceedings, petitioner's privilege claim nonetheless fails. This is so for several reasons. First, because Mrs. Clinton is not a government officer or employee, she is not a representative of the client under *Upjohn*. Cf. *Association of American Physicians and Surgeons, Inc.* v. *Clinton*, 997 F.2d 898, 911 (D.C. Cir. 1993) (First Lady, in official role as Chair of the Presi-

dent's Task Force on National Health Care Reform, was "officer or employee" for purposes of Federal Advisory Committee Act). Second, even if Mrs. Clinton is a government officer or employee, the privilege applies only to communications that "concerned matters within the scope of the employees' [governmental] duties." *Upjohn*, 449 U.S. at 394. The handling of the Rose Law Firm billing records and of documents from Mr. Foster's office did not involve governmental duties assigned to Mrs. Clinton.

Even if Mrs. Clinton is a client and the communications concerned matters within the scope of her official duties, the privilege claim still fails because the official meetings in question occurred in the presence of third parties—namely, Mrs. Clinton's personal attorneys. Although that fact would not defeat the privilege if Mrs. Clinton and the White House could satisfy the requirements of the so-called "common interest" exception to the no-third-party-presence requirement of the attorney-client privilege, they cannot do so here.

This Court has not considered whether there is a "common interest" exception to the traditional rule that attorney-client communications, to be privileged, must occur outside the presence of third parties. That is a highly important issue as to which the law is, in the main, underdeveloped. Courts have recognized the exception in two narrowly limited circumstances: (1) when two clients share the same attorney or (2) when two parties are co-defendants or co-plaintiffs in pending litigation. Neither situation exists here. Even if the Court assumed the common-interest exception applied to *anticipated* as well as pending litigation, see *Continental Oil Co.* v. *United States*, 330 F.2d 347, 350 (9th Cir. 1964), it would not be satisfied. At the meetings in question, the White House and Mrs. Clinton were not anticipating the possibility of future litigation in which they might be aligned as parties. The White House Office, as an agency, was not anticipating litigation at all. Moreover, a federal government agency does not possess an interest in common with an individual as *against* the United States in a

criminal investigation or prosecution. See 4B Op. Off. Legal Counsel 749, 751 (1980) ("This Office has long held the view that the Government may not participate on both sides of a federal criminal investigation.").

2. Assuming *arguendo* that a government agency can maintain a governmental work product privilege in federal grand jury proceedings, that claim also fails. The work product doctrine covers work performed by an attorney "in anticipation of litigation." The White House as an entity was not anticipating litigation. That ends the issue. Petitioner's primary response is that congressional proceedings are equivalent to litigation. Pet. 27-29. But that argument has no case law support and contradicts the plain meaning of the term "litigation." The work product doctrine is "grounded in the realities of litigation in our adversary system," *United States v. Nobles*, 422 U.S. 225, 238 (1975), and simply does not apply to "[m]aterials assembled in the ordinary course of business, or pursuant to *public* requirements unrelated to litigation, *or for other nonlitigation purposes*," Fed. R. Civ. P. 26 advisory committee's note (emphases added).

V

Finally, we note a procedural point: The current caption of this case is directly contrary to the independent counsel statute, see 28 U.S.C. 594(a), and to this Court's consistent practice.

The issue also plays itself out in the cauldron of trials. Opposing counsel at times prefer to label prosecutors as "the independent counsel" and to state or imply that the prosecutors do not represent the United States. In the 1996 trial of Jim Guy Tucker and the McDougals, Judge George Howard, Jr., put an end to gamesmanship of this sort in the presence of the jury during the examination of David L. Hale:

> Mr. Collins (Tucker's Attorney): If your Honor please, I said Independent Counsel; I didn't say the United States, and I believe—

> Mr. Jahn (Associate Independent Counsel): We are the United States, your Honor.
>
> Mr. Collins: They are not. * * * [T]hey are Independent Counsel appointed under a special act. * * *
>
> The Court: The indictment which was rendered by citizens of this state, the caption is United States of America versus James B. McDougal, Jim Guy Tucker, and Susan H. McDougal. Mr. Jahn and his associates represent the United States of America. Disregard the comment made by Mr. Collins. Go ahead.

United States v. *McDougal, Tucker, and McDougal,* No. LR-CR-95-173, Tr. 4525-4527 (E.D. Ark. Apr. 11, 1996).

The caption of this case, by referring to the "Office of Independent Counsel," directly contradicts Section 594(a) of Title 28. It is the law, not convention, which establishes that this Office, within its jurisdiction, possesses the full "authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice [and] the Attorney General" and is responsible for "handling all aspects of any case, *in the name of the United States.*" 28 U.S.C. 594(a) (emphasis added).[32] In addition, "[w]hen issuing * * * subpoenas, an independent counsel stands in the place of the Attorney General." S. Rep. No. 100-123, at 22 (1987); see 28 U.S.C. 594(a). The statutory language is supported by the consistent practice of this Court for over two decades of identifying the "United States" as the party in cases involving special prosecutors and independent counsels.[33]

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[32] Under the statute, "the Attorney General or the Solicitor General" may "mak[e] a presentation as amicus curiae." 28 U.S.C. 597(b). But in such cases, the Independent Counsel still exercises authority, within his jurisdiction, "in the name of the United States." 28 U.S.C. 594(a)(9).

[33] See, *e.g.*, *Tucker* v. *United States*, 117 S. Ct. 76 (1996); *Marks* v. *United States*, 117 S. Ct. 76 (1996); *Haley* v. *United States*, 117 S. Ct. 76 (1996); *Fitzhugh* v. *United States*, 117 S. Ct. 256 (1996);

Neither the governing statute nor this Court's practice admits of an exception when the other party before the Court is a separate entity within the Executive Branch. As to that issue, moreover, there is controlling precedent: *United States* v. *Nixon*.[34]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied. If the Court grants the petition, we respectfully request that oral argument be scheduled expeditiously so that delay in the orderly progress of this sensitive criminal investigation is minimized.

Respectfully submitted.

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May 1997

United States v. *Poindexter*, 506 U.S. 1021 (1992); *North* v. *United States*, 500 U.S. 941 (1991); *United States* v. *Nofziger*, 493 U.S. 1003 (1989); *Poindexter, North, and Hakim* v. *United States*, 490 U.S. 1004 (1989); *Deaver* v. *United States*, 484 U.S. 829 (1987); *Mitchell and Haldeman* v. *United States*, 431 U.S. 933 (1977); *Ehrlichman* v. *United States*, 431 U.S. 933 (1977); *Barker* v. *United States*, 421 U.S. 1013 (1975); *United States* v. *Nixon*, 418 U.S. 683 (1974). In cases arising out of federal grand jury proceedings, moreover, the caption refers to federal government prosecutors as the "United States." See, *e.g.*, *United States* v. *R. Enterprises, Inc.*, 498 U.S. 292 (1991). In *Morrison* v. *Olson*, 487 U.S. 654 (1988), the question presented was *whether* the independent counsel did, and constitutionally could, represent the United States in the criminal investigation. There is no such question here.

[34] There, as here, the President asserted a governmental privilege in refusing to comply with a subpoena duces tecum during criminal proceedings.

APPENDIX

STATUTE AND RULE INVOLVED

Federal Rule of Evidence 501 provides:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

28 U.S.C. 535(b) provides:

> Any information, allegation, or complaint received in a department or agency of the executive branch of the Government relating to violations of title 18 involving Government officers and employees shall be expeditiously reported to the Attorney General by the head of the department or agency, unless—
>
> > (1) the responsibility to perform an investigation with respect thereto is specifically assigned otherwise by another provision of law; or
> >
> > (2) as to any department or agency of the Government, the Attorney General directs otherwise with respect to a specified class of information, allegation, or complaint.

Supreme Court, U.S.
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No. 96-1783

In the Supreme Court of the United States

OCTOBER TERM, 1996

OFFICE OF THE PRESIDENT, PETITIONER

v.

OFFICE OF INDEPENDENT COUNSEL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF AMICUS CURIAE FOR THE UNITED STATES, ACTING THROUGH THE ATTORNEY GENERAL, SUPPORTING CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Office of the President may decline to produce documents sought by a federal grand jury subpoena on the ground that the documents are protected by an attorney-client privilege.

2. Whether the Office of the President may decline to produce documents sought by a federal grand jury subpoena on the ground that they are protected by the work product doctrine because they were prepared by its attorneys in connection with grand jury proceedings and legislative proceedings.

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BRIEF AMICUS CURIAE FOR THE UNITED STATES, ACTING THROUGH THE ATTORNEY GENERAL, SUPPORTING CERTIORARI

INTEREST OF THE UNITED STATES

Petitioner and respondent represent discrete interests of the United States in this specific litigation. The issues presented, however, implicate fundamental concerns of the United States that extend far beyond the particular circumstances of this case. Thus, although special counsel have been appointed by the Department of Justice to represent the Office of the President in this case, the United States has a broad and substantial interest in the ability of the President and Executive Branch agencies generally to obtain frank, fully informed, and confidential legal advice. And although the Independent Counsel has the "authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice" with respect to matters within his jurisdiction, 28 U.S.C. 594(a), the Attorney General is otherwise responsible for federal criminal prosecutions. See 28 U.S.C. 597(b) (authorizing Attorney General and Solicitor Gen-

eral to participate as amicus curiae in independent counsel cases).

The unique nature of this case led the Attorney General to conclude at the time this dispute arose that the White House should be represented by specially appointed counsel, who would be in a position to review the attorney notes subpoenaed by the Independent Counsel and respond to the motion to compel on that basis.[1] The Attorney General reserved, however, the right to file a brief addressing legal issues of broader interest to the United States in appropriate circumstances. The opinion of the court of appeals now presents those circumstances.[2]

STATEMENT

1. a. On July 11, 1995, First Lady Hillary Rodham Clinton met with David Kendall, an attorney representing both the President and Mrs. Clinton in their personal capacities, at the White House Residence for the purpose of obtaining legal advice. Late in the meeting, two attorneys from the White House Counsel's Office, Jane Sherburne and Miriam Nemetz, joined them. Ms. Nemetz took some notes during the meeting. The subject of that part of the meeting was Mrs. Clinton's activities in the period immediately following the suicide of White House Deputy Counsel Vincent Foster in 1993. At the time of the meeting, investigations relating to what has become known as "Whitewater," including the handling of documents in the aftermath of the Foster suicide, were being conducted by the Independent Counsel, the Senate Whitewater Committee, the House Banking and Government Reform Committees, the Federal Deposit Insurance Corporation, and the Resolution Trust Corporation.

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[1] The Department of Justice has not reviewed the notes and is not aware of their contents.

[2] The district court opinion, and all proceedings in both lower courts, were subject to a seal order, and prior to this stage we did not review them.

The Independent Counsel had scheduled a deposition of Mrs. Clinton regarding the Foster document matter for July 22, 1995. Pet. App. 88a-89a, 94a.

b. Early in January 1996, a White House employee found in the White House Residence a copy of billing records relating to work performed by members of the Rose Law Firm, including Mrs. Clinton. Those records were responsive to a May 1994 grand jury subpoena to Mrs. Clinton. On January 19, 1996, the Independent Counsel issued a subpoena for Mrs. Clinton to testify before a Washington, D.C., grand jury regarding the discovery of the billing records. Other investigations regarding the discovery of the records were being undertaken by the Senate Whitewater Committee and other federal agencies. Mrs. Clinton testified before the grand jury on January 26, 1996. During breaks in her testimony, Mrs. Clinton met in a private room in the courthouse with Kendall, his partner Nicole Seligman, White House Counsel John Quinn, and Sherburne. After the testimony was completed, Mrs. Clinton met at the White House Residence with Sherburne, Kendall, and Seligman. Sherburne took notes during those meetings. Pet. App. 66a n.3, 89a-90a, 94a.

2. On June 21, 1996, on the application of the Independent Counsel, a grand jury in the Eastern District of Arkansas issued a subpoena to "The White House c/o Jane Sherburne, Special Counsel to the President." The subpoena sought, inter alia (Resp. C.A. App. 2-3):

> All documents created during any meeting attended by any attorney from the Office of the Counsel to the President and Hillary Rodham Clinton (regardless whether any other person was present), between July 20, 1993, and the present, which relate in any way to the death of Vincent W. Foster, Jr., documents in the office of Vincent W. Foster, Jr., at the time of his death, or events between July 20 and July 27, 1993.

The White House Counsel identified nine sets of notes that were responsive to the subpoena, but refused to produce them on the ground of attorney-client privilege and the work product doctrine. The Independent Counsel then moved to compel production, but only of the Nemetz notes of the July 11, 1995, meeting, and the Sherburne notes of the January 26, 1996, meetings. Pet. App. 2a-3a.

3. On November 26, 1996, the district court denied the Independent Counsel's motion to compel production. Pet. App. 62a-83a. The court concluded that the law in this area is "uncertain," that "Mrs. Clinton, as the functional equivalent of an officer or employee of the White House, considered her communications with lawyers from the White House Counsel's Office and personal counsel, as did those lawyers, to be confidential and for the purpose of receiving legal advice," and that the attorney-client privilege should protect the conversations for that reason—regardless of whether the privilege legally applies. *Id.* at 80a. The court also held that the notes are "work product of the type that is clearly protected from disclosure to the grand jury." *Id.* at 81a.

4. a. A divided panel of the Eighth Circuit reversed. Pet. App. 1a-61a. The majority reasoned that the principal question in this case—"whether an entity of the federal government may use the attorney-client privilege to avoid complying with a subpoena by a federal grand jury," Pet. App. 5a—is governed by Rule 501 of the Federal Rules of Evidence. That Rule provides that "the privilege of a witness, person, government, State, or political subdivision thereof [is] governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." In the majority's view, *United States* v. *Nixon*, 418 U.S. 683 (1974), "is indicative of the general principle that the government's need for confidentiality may be subordinated to the needs of the government's own criminal justice processes." Pet. App. 15a. In the

context of attorney-client communications, the court held, the governmental interest in confidentiality can never overcome a grand jury subpoena. See *id.* at 17a-20a.

The court rejected the argument that the governmental attorney-client privilege is supported by the same rationale—and should have the same scope—as the corporate attorney-client privilege recognized by this Court in *Upjohn Co.* v. *United States*, 449 U.S. 383 (1981). The court believed that White House lawyers require confidentiality less than their corporate counterparts because "the actions of White House personnel, whatever their capacity, cannot expose the White House as an entity to criminal liability," and the White House therefore does not have a compelling interest in ferreting out misconduct by its employees. Pet. App. 17a. In addition, the court found it "significant that executive branch employees, including attorneys, are under a statutory duty to report criminal wrongdoing by other employees to the Attorney General" pursuant to 28 U.S.C. 535(b). *Ibid.* Finally, drawing an analogy between the responsibilities of government lawyers and the responsibilities of auditors to "maintain total independence from the client at all times" and to assume "public obligations" as a "public watchdog," *id.* at 17a-18a (quoting *United States* v. *Arthur Young & Co.*, 465 U.S. 805, 817-818 (1984)), the court concluded that the "strong public interest in honest government and in exposing wrongdoing by public officials would be ill-served by recognition of a governmental attorney-client privilege applicable in criminal proceedings inquiring into the actions of public officials," *id.* at 18a.[3]

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[3] The court rejected the argument that the presence of Mrs. Clinton's private attorneys "affects the calculus in this case," Pet. App. 20a, finding no "common interest" sufficient to render the private and public representations jointly privileged, *id.* at 21a-23a. And the court rejected the district court's reasoning that Mrs. Clinton's subjective belief

The court also rejected application of the work product doctrine, because it believed that White House Counsel was not "preparing for or anticipating some sort of adversarial proceeding involving his or her client." Pet. App. 25a-26a. It found "unpersuasive" the White House's position that its lawyers were preparing for the Independent Counsel's investigation, because the "OIC is not investigating the White House, nor could it do so." *Id.* at 26a. Nor, in the court's view, did congressional investigations trigger the work product doctrine, because they were directed not at the White House, but at individuals, and could result only in "political"—not legal—harm. *Id.* at 26a-27a.

b. District Judge Kopf dissented. Pet. App. 29a-61a. He believed that recognition of the attorney-client privilege in this setting falls squarely within proposed Federal Rule of Evidence 503, as well as other authoritative sources. See *id.* at 33a-38a. In his view, the fact that this is a criminal proceeding has no bearing on the application *vel non* of the attorney-client privilege, *id.* at 36a, and the public interest favors recognition of a privilege so that governmental entities may obtain legal advice about how to obey the law, *id.* at 37a-44a. Judge Kopf concluded, however, that although the ordinary prerequisites of the privilege were satisfied, see *id.* at 44a-49a, it generally can be invaded in the unique setting of a subpoena issued in connection with an independent counsel investigation on a showing of need and with appropriate procedural protections, *id.* at 51a-55a. In this case, Judge Kopf reasoned that producing the notes would unjustifiably invade Mrs. Clinton's personal attorney-client privilege, because both she and the White House Counsel reasonably expected the communications to be confidential. *Id.* at 59a-61a.

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that a privilege attached to the conversations in question was sufficient by itself to warrant refusing to enforce the subpoena. *Id.* at 23a-25a.

DISCUSSION

The United States is ordinarily entitled to the same attorney-client privilege that is available to private individuals and corporations. This case, however, does not arise from the ordinary situation in which the privilege is asserted by its holder against an outside entity. This case involves claims to information by prosecutorial interests of the United States represented by the Independent Counsel, on the one hand, and assertion of the attorney-client privilege for the same information by the Office of the President, on the other. The grand jury, working in conjunction with the Independent Counsel, has issued a subpoena and, through the Independent Counsel, has sought judicial enforcement of it. The primary position of the Office of the President is that the attorney-client privilege is absolute and therefore necessarily prevails against the grand jury subpoena. The position of the Independent Counsel and the court of appeals, by contrast, is that there is no attorney-client privilege in this setting and that the grand jury subpoena therefore necessarily prevails.

We see the matter from a different perspective. A purely intra-Executive Branch disagreement over the availability and use in court of information held by a federal agency would typically be resolved within the Executive Branch based on consideration of the various interests of the United States as a whole. In that setting, the Attorney General, who is charged with conducting litigation on behalf of the United States and its agencies, is in a position to reconcile all litigation and non-litigation interests and to speak for the single client (the United States) in all of its aspects—to assert or waive in litigation privileges that might otherwise be absolute as against parties outside the Executive Branch. Although in criminal cases the government's investigative and prosecutorial interests have great weight, there may be cases in which those interests are attenuated or are outweighed by the need for confidentiality.

Because this case involves a grand jury subpoena issued at the behest of an independent counsel—who is vested with responsibility for only one discrete interest of the United States and who does not operate under the direct supervision of the President or the Attorney General—there is no opportunity for the weighing of all relevant interests of the United States within the Executive Branch. That task thus necessarily falls to the district court in ruling on the Independent Counsel's motion to enforce the grand jury subpoena. In applying the law of privileges under Rule 501 in that setting, the President's interest in confidentiality supports application of the attorney-client privilege. The demands of criminal law enforcement, however, may require in a particular instance that the privilege give way. Cf. *United States* v. *Nixon*, 418 U.S. 683 (1974).

In holding that the privilege automatically gives way in response to an otherwise valid grand jury subpoena, the court of appeals' decision lays open the White House Counsel (and by extension federal agency counsel) to an ever-present potential for unrestrained intrusion into their ongoing attorney-client communications. That result would impair the ability of the President (and the heads of federal agencies) to obtain frank, fully informed, and confidential legal advice. The same is true of the court of appeals' categorical refusal to afford any protection through the work product doctrine. In light of the court of appeals' legal errors and the resulting practical consequences, review by this Court is warranted.

1. The attorney-client privilege "functions to protect communications between government attorneys and client agencies or departments * * * much as it operates to protect attorney-client communications in the private sector." Memorandum for the Attorney General re: Confidentiality of the Attorney General's Communications in Counseling the President, 6 Op. O.L.C. 481, 495

(1982) (1982 OLC Opinion).[4] The rationale for the governmental privilege is much the same as that for the corporate privilege recognized in *Upjohn Co.* v. *United States*, 449 U.S. 383 (1981). To paraphrase the Court's reasoning in *Upjohn*:

> In light of the vast and complicated array of regulatory legislation confronting [federal agencies], [agencies], like most individuals, constantly go to lawyers to find out how to obey the law, particularly since compliance with the law in this area is hardly an instinctive matter.

Id. at 392 (citations and internal quotation marks omitted). The purpose of the privilege in the governmental context, as in the private context, is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Id.* at 389.

All of the authoritative sources agree with that proposition—and none recognizes any categorical exception to the privilege in criminal proceedings. The proposed Federal Rules of Evidence, whose status as a solid indication of the scope of the "common law" of privilege under Rule 501 has frequently been recognized, see, *e.g.*, *United States* v. *Gillock*, 445 U.S. 360, 367-368 (1980), included a rule regarding the attorney-client privilege. That rule defined "client" to include "a person, *public officer*, or corporation, association, or other organization or entity, *either public or private*." *Rules of Evidence for United States Courts and Magistrates*, 56 F.R.D. 183, 235 (1972) (emphasis added). Similarly, the Restatement (Third) of

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[4] See also 6 Op. O.L.C. at 483 ("[T]he Attorney General may assert the common-law privilege for attorney-client communications, which has been codified in Rule 501 of the Federal Rules of Evidence * * *, to protect from disclosure in litigation certain confidential communications of a legal advisory nature which were prepared for the Office of the President.").

the Law Governing Lawyers § 124, Proposed Final Draft No. 1 (approved May 28, 1996) (Restatement), states that "[t]he attorney-client privilege extends to a communication of a governmental organization," and Uniform Rule of Evidence 502(a)(1) defines "client" to include governmental bodies.[5] The attorney-client privilege of federal agencies in particular (along with the work product doctrine) has been recognized and affirmed under the Freedom of Information Act.[6]

The court of appeals' rejection of any attorney-client privilege in this setting rested on two fundamentally erroneous propositions: (1) that the White House is less in need of confidential legal advice than a corporation because the White House as an entity has no exposure to legal liability and has no compelling interest in conducting investigations to ferret out misconduct by its employees, Pet. App. 17a; and (2) that White House Counsel and other government attorneys are properly analogized to outside auditors who serve as "public watchdogs" and must "maintain total independence from the client at all times," *id.* at 17a-18a.

Contrary to the court of appeals' view, attorneys in the government, like their counterparts elsewhere, have du-

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[5] Uniform Rule 502(d)(6) limits application of the privilege in the governmental context to situations involving a pending investigation or litigation and requires a finding by the court that disclosure will "seriously impair" the agency's pursuit of the investigation or litigation. As the court of appeals recognized (Pet. App. 8a n.5), many States that have adopted the Uniform Rules have omitted this qualification.

[6] FOIA Exemption 5, 5 U.S.C. 552(b)(5), protects from disclosure materials that would normally be privileged from discovery in litigation with the agency. *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). In *Sears, Roebuck*, this Court found it "clear that Congress had the attorney's work-product privilege specifically in mind when it adopted Exemption 5 and that such a privilege had been recognized in the civil discovery context by the prior case law." *Id.* at 154. The lower courts have routinely held that Exemption 5 applies as well to attorney-client privileged materials. See, *e.g.*, *Mead Data Cent., Inc.* v. *United States Dep't of Air Force*, 566 F.2d 242, 252-253 & n.20 (D.C. Cir. 1977); Pet. 18 n.5 (citing cases).

ties of loyalty and confidentiality to their client (see ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 97-405 (Apr. 19, 1997), slip op. 4-5; Restatement § 156 cmt. d), and a governmental client plainly does have a compelling interest in investigating allegations of wrongdoing by its employees. Moreover, the need of the President and other Executive Branch officials to obtain frank, fully informed, and confidential legal advice so that they may conform their conduct to the law is at least as great as that of non-governmental clients. Thus, where a governmental attorney-client communication satisfies the ordinary prerequisites of the privilege, the communication is privileged from disclosure to outsiders to the same extent—and for the same reasons—as a corporate attorney-client communication would be.

2. a. The fact that the federal government enjoys an absolute attorney-client privilege as against outside parties does not, however, resolve this case. It is necessary to consider as well how decisions are made within the Executive Branch whether to assert or waive privileges in litigation, including in grand jury investigations. If an agency possesses information protected by the attorney-client privilege, no abrogation or waiver of that privilege would result from furnishing the information to the Attorney General, who represents the interests of the United States as a whole, including its constituent agencies. See 28 U.S.C. 511, 512, 516, 533, 547. The only question at that stage would be whether the need for the information outweighs any adverse impact on the effective provision of legal advice to the agency possessing the information that might result from the intra-Branch disclosure.[7] If information is obtained by the Attorney Gen-

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[7] The same principles would apply within a private corporation with respect to information protected by the attorney-client privilege under *Upjohn*. No waiver of the privilege would result if counsel in one division of the corporation furnished the privileged information to counsel in another division, or to the general counsel of the corporation

eral, a further question may later arise about whether to use the information in criminal or civil litigation. Although the Attorney General's weighing of the relevant interests informing that decision would ordinarily occur in consultation with the agency involved, the agency could, if necessary, present any irreconcilable differences to the President.[8]

Where the Attorney General seeks information directly relating to the commission of a federal crime, the Justice Department's experience indicates that it would be rare for the Attorney General to strike the balance against obtaining it, given the compelling federal interest in investigation and prosecution of federal crimes.[9] The Attorney General may obtain or review the information with the understanding that there would be further consultation with the agency concerned before the material would be used in a manner that would abrogate the attorney-client (or other) privilege. After obtaining the information, there may often be situations in which the Attorney General, after again weighing the relevant considerations, would in turn choose to submit evidence protected by the governmental attorney-client privilege to a grand jury, or to introduce it into evidence at trial.[10] But

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as a whole. Whether to share the information in that manner would be a matter of internal policy to be resolved by the responsible decisionmakers within the corporation, taking into account the various interests of the corporation.

[8] Both parties agree. See Pet. 20 n.6 ("any such intrabranch disputes would ordinarily * * * be resolved by consultation between agency heads or, if necessary, by the chief executive"); Br. in Opp. 25 (discussing "internal negotiation process within the Executive Branch").

[9] That understanding is consistent with the Independent Counsel's description of the facts of this case, in which the White House has produced "numerous sets of notes taken by White House attorneys in interviews of current and former White House employees." Resp. C.A. App. 18 (Declaration of John D. Bates).

[10] A similar balancing of interests takes place within the Executive Branch in deciding under the Classified Information Procedures Act, 18 U.S.C. App. III, whether classified information will be used or disclosed in a criminal prosecution.

there may also be situations in which the potential chilling of the effective provision of legal advice to the agency concerned would outweigh the prosecution's need to use particular information—*e.g.*, where the information bore less directly on the investigation or trial, or where the information sought reflects, not the historical matters under investigation, but rather the agency's consideration of the request for information itself. What is significant is that, in the ordinary case, the Attorney General, in consultation with other Executive Branch officials and subject to the ultimate authority of the President, would weigh all of the relevant interests of the single client, the United States.

b. When a grand jury, at the behest of an independent counsel, seeks information from an Executive Branch agency, the balancing process described above cannot fully function. Neither the President nor any other Executive Branch official is in a position to determine the extent of the independent counsel's need for the information. Those officials cannot realistically require the independent counsel to reveal the precise status of his investigation, and the very purpose of the independent counsel statute is to preclude Executive Branch officials from exercising operational control over the independent counsel's investigation. By the same token, the independent counsel, who exercises only the "investigative and prosecutorial functions and powers of the Department of Justice and the Attorney General" in a particular defined matter, 28 U.S.C. 594(a), has no institutional competence or authority to balance the prosecutorial need for the information against the potential threat to the ability of the President or other high official effectively to obtain legal advice.[11] In short, no single official

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[11] The independent counsel statute authorizes an independent counsel to "determin[e] whether to contest the assertion of any testimonial privilege," 28 U.S.C. 594(a)(5), but it does not authorize an independent counsel to decide whether a privilege will be asserted or waived by the United States in the first instance.

is in a position to weigh all relevant considerations and speak for the United States as a whole in this situation.

Under these circumstances, a district court, in ruling on an independent counsel's motion to compel production, must resolve the dispute over the availability and use of the information. In so doing, a district court should be mindful that the governmental attorney-client privilege is absolute as against outside parties; the court should be mindful as well of the respective statutory interests and roles of the agency concerned, the Attorney General, and the independent counsel, and the constitutional office and responsibilities of the President.[12] Those considerations are fully accommodated by Rule 501 of the Federal Rules of Evidence, which states that "[e]xcept as otherwise required by the Constitution of the United States or provided by Act of Congress * * * , the privilege of a * * * government * * * shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

We submit that against the backdrop of the governing constitutional and statutory framework, "reason and experience" suggest that the district court should, in ruling on the motion to compel, accommodate the competing interests at stake in a manner similar to the accommodation that takes place in an ordinary, non-independent-counsel context.[13] Such an approach would not unsettle

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[12] Our position is consistent with the Restatement, § 124 cmt. b, which provides:

> More particularized rules may be necessary where one agency of government claims the privilege in resisting a demand for information by another. Such rules should take account of the complex considerations of governmental structure, tradition, and regulation that are involved.

[13] For example, if a government attorney learned that an official had destroyed subpoenaed documents or paid off a potential witness, see Br. in Opp. 20, the privilege should surely yield. In contrast, if a subpoena sought otherwise readily available factual material, which is

the legitimate expectations of agency officials and counsel, because it would resemble the treatment within the Executive Branch of confidential communications potentially relevant to a criminal investigation or trial. Nor would this approach hamper the investigation and prosecution of crimes, since enforcement activities outside the independent counsel setting would be governed by similar considerations.

Neither court below attempted the accommodation of interests that we believe is required, and at this stage we therefore do not address what the precise standard of review should be. A useful analogy, however, can be drawn to the resolution of assertions of executive privilege. See *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 447 (1977) (*United States* v. *Nixon* held that "in the case of the general privilege of confidentiality of Presidential communications, its importance must be balanced against the inroads of the privilege upon the effective functioning of the Judicial Branch").

In this respect, the court of appeals erred in stating that the *Nixon* test would not be satisfied unless the subpoenaed party could show "that there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation." Pet. App. 13a n.9 (quoting *United States* v. *R. Enterprises, Inc.*, 498 U.S. 292, 301 (1991)); cf. *United States* v. *North*, 910 F.2d 843, 952 (Silberman, J., concurring in part and dissenting in part), opinion withdrawn and superseded in part on other grounds on reh'g, 920 F.2d 940 (D.C. Cir. 1990), cert. denied, 500 U.S.. 941 (1991). That is the standard that *any* grand jury subpoena must satisfy, even when no privilege is claimed. That standard therefore is inconsistent with this Court's direction that a district court must "treat the subpoenaed material [for which executive privilege is asserted] as presumptively privi-

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embedded in a legal analysis provided by an attorney to an agency head, the privilege should ordinarily prevail.

leged," *United States* v. *Nixon*, 418 U.S. at 713, and must require, as a prerequisite to disclosure, that the prosecutor demonstrate that the subpoenaed material is "essential to the justice of the [pending criminal] case," *ibid.* (quoting *United States* v. *Burr*, 25 F. Cas. 187, 192 (C.C. Va. 1807) (No. 14,694) (Marshall, J.)). See also *ibid.* ("privilege must yield to the demonstrated, specific need for evidence"); *Nixon* v. *Sirica*, 487 F.2d 700, 717-719 (D.C. Cir. 1973) (en banc; per curiam) (applying need standard in grand jury setting to claim of executive privilege). As in other settings, a district court may have to receive information from the parties *ex parte* and review the materials *in camera* in order to determine whether disclosure should be ordered.[14]

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[14] Respondent argues (Br. in Opp. 24-25 & n.30) that "[t]his Court has consistently rebuffed efforts to require" the sort of accommodation approach we propose. It is true that the Court has rejected such an approach as an ordinary feature of the enforcement of grand jury subpoenas, in cases in which no privilege has been asserted. See *R. Enterprises*, 498 U.S. at 298. But such tests are routinely used in connection with certain types of privilege claims, most notably the work product doctrine. See, *e.g.*, *Hickman* v. *Taylor*, 329 U.S. 495, 511-512 (1947) ("[A] burden rests on the one who would invade th[e] privacy [of an attorney's course of preparation] to establish adequate reasons to justify production through a subpoena or court order."); Fed. R. Civ. P. 26(b)(3) (requiring a showing that "the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means"). Other courts have applied the work product test in the context of criminal grand jury proceedings. See, *e.g.*, *In re John Doe*, 662 F.2d 1073, 1078 (4th Cir. 1981), cert. denied, 455 U.S. 1000 (1982); *In re Grand Jury Investigation*, 599 F.2d 1224, 1228-1232 (3d Cir. 1979); *In re Grand Jury Subpoena*, 599 F.2d 504, 512-513 (2d Cir. 1979); *In re Grand Jury Proceedings*, 473 F.2d 840, 842-849 (8th Cir. 1973). See also *Roviaro* v. *United States*, 353 U.S. 53, 62 (1957) (informer privilege); *In re Certain Complaints Under Investigation*, 783 F.2d 1488, 1520 (11th Cir.) (privilege for confidential communications among judges and their staffs), cert. denied, 477 U.S. 904 (1986); *King* v. *Conde*, 121 F.R.D. 180, 190-195 (E.D.N.Y. 1988) ("governmental privilege" for confidential police materials); *Kelly* v. *City of San Jose*, 114 F.R.D. 653, 660-671 (N.D. Cal. 1987) (same); *Hartman* v. *Remington Arms Co.*, 143 F.R.D. 673, 675

c. Respondent argues (Br. in Opp. 11-16) that 28 U.S.C. 535(b) is inconsistent with the assertion of a privilege in the context of this case. Section 535(b) provides that "[a]ny information * * * received in a department or agency of the executive branch of the Government relating to violations of title 18 involving Government officers and employees" must be reported to the Attorney General, subject to certain exceptions. It was enacted to settle a dispute within the government by providing that the Department of Justice has general responsibility to investigate possible criminal wrongdoing, regardless of where in the government such wrongdoing comes to light. See H.R. Rep. No. 2622, 83d Cong., 2d Sess. 1, 2 (1954).

It is uncertain whether Section 535(b) applies of its own force to the Office of the President, compare *Franklin* v. *Massachusetts*, 505 U.S. 788, 800-801 (1992) (President not an "agency" for purposes of Administrative Procedure Act), and that Section (which applies only to violations of Title 18 and only those by federal employees) does not in any event cover the full range of situations in which a federal agency may come into possession of evidence of a federal crime. We assume, however, that the President (and other Executive officials) would nevertheless recognize an equivalent duty to report to the Attorney General information received by the White House (or a federal agency) concerning federal criminal violations. Any such reporting could have no effect on the ability of the government to assert an attorney-client privilege, however, since the officer to whom the information must be reported—the Attorney General—is herself the lawyer for the Executive Branch. Indeed, it is the Attorney General who ordinarily is responsible for deciding (after weighing the relevant considerations) whether to assert or waive the governmental attorney-client privilege in litigation. Thus, a duty to report in-

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(W.D. Mo. 1992) (trade secrets privilege); *Duplan Corp.* v. *Deering Milliken, Inc.*, 397 F. Supp. 1146, 1185 (D.S.C. 1974) (same).

formation concerning criminal violations to the Attorney General is entirely consistent with the approach we propose.

3. The work product doctrine also provides qualified protection in the context of this case. See *United States* v. *Nobles*, 422 U.S. 225, 239 (1975) (work product doctrine applicable in criminal cases); *Hickman* v. *Taylor*, 329 U.S. 495 (1947); *United States* v. *Davis*, 636 F.2d 1028, 1039 n.10 (5th Cir.) ("[I]t is uniformly held that the work product doctrine applies to grand jury proceedings.") (collecting cases), cert. denied, 454 U.S. 862 (1981). The court of appeals rejected that conclusion only because it believed that the materials at issue were not prepared "in anticipation of litigation." See Pet. App. 25a-26a. That view is mistaken.

Where the subpoenaed governmental entity has a legitimate interest in evaluating the assertion of applicable privileges in response to the subpoena, with the resultant potential for litigation, the attorney's work product may have been created "in anticipation of litigation" and thus be within the scope of the work product doctrine. In this case, one of Ms. Sherburne's roles at the time of the grand jury investigation was to "advise[] and assist[] the Office of the President in determining whether any privileges or other confidentiality interests should be asserted with regard to any of the information requested" and to "negotiate[] with the [Independent Counsel] * * * to accommodate interests in privileged material." Pet. App. 85a-86a.

In addition, the White House has represented that the notes at issue here were prepared, at least in part, in order to "facilitate[] advice to the Office of the President regarding responses to congressional inquiries." Pet. App. 90a; accord *id.* at 88a. The work product doctrine applies when a congressional committee is investigating matters within the Executive Branch, because the agency has a strong interest in assuring that the work of its counsel in assisting agency officials to respond to the

investigation will not be subject to mandatory disclosure—either to the committee or to third parties in subsequent litigation. See Restatement § 136 cmt. h (litigation "includes a proceeding such as * * * an investigative legislative hearing"). The Attorney General and the Office of Legal Counsel have consistently taken the position that work product (like attorney-client communication) is protected in this setting. See Letter from the Attorney General to the President 2 (May 23, 1996) (citing Response to Congressional Requests for Information Regarding Decisions Made Under Independent Counsel Statute, 10 Op. O.L.C. 68, 78 & n.17 (1986); 1982 OLC Opinion, 6 Op. O.L.C. at 490 n.17, 494 & n.24).[15]

4. For the foregoing reasons, the court of appeals erred in holding that neither the attorney-client privilege nor the work product doctrine provides any protection at all to the subpoenaed notes. Those holdings have sufficiently important consequences to warrant review by this Court.

The court's holding unduly diminishes the ability of the President and other high-ranking Executive Branch officials to obtain legal advice and act accordingly re-

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[15] Respondent argues (Br. in Opp. 27) that the enforcement of the subpoena in this case was called for in any event "because the official meetings in question occurred in the presence of third parties—namely, Mrs. Clinton's personal attorneys." We disagree. There are important governmental interests in ensuring that agency counsel will be able to interview agency personnel as part of internal investigations, yet those officials may be unwilling to participate if the agency were forced to exclude their private counsel altogether in order to ensure that the investigation would be privileged. Thus, although the presence of Mrs. Clinton's private counsel does not prevent the government from waiving its privileges in the future, it did not result in an *automatic* abrogation of all protection for the information.

Respondent also maintains (Br. in Opp. 26-27) that no valid privilege can be asserted in this case because Mrs. Clinton "is not a representative of the [White House] client under *Upjohn*." The district court correctly rejected that conclusion, see Pet. App. 70a-72a, and the court of appeals did not disagree with that aspect of the district court's decision.

garding matters that have—or that may come to have—some relevance in an independent counsel investigation (and parallel congressional inquiries). The United States has compelling interests in investigating and prosecuting crimes—inside or outside the government—and the Justice Department's performance of those tasks is aided by the duty of the President and other government officials to report evidence of criminal violations to the Attorney General. At the same time, the Constitution requires the President to adhere to and follow the law, both in his oath of office (Art. II, § 1, Cl. 8), and in the requirement that "he shall take Care that the Laws be faithfully executed" (Art. II, § 3). To fulfill those responsibilities, the President must have access to legal advice that is frank, fully informed, and confidential.

The court of appeals' categorical holding will have the practical effect of diminishing the ability of the President and Executive Branch agencies to obtain such advice, for it denies any protection for attorney work product and attorney-client communications that may be swept within the broad ambit of a grand jury subpoena in this or a future independent counsel investigation. Because a grand jury "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not," *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642-643 (1950), the court of appeals' decision threatens to have a significant chilling effect for counsel and officials in the White House and federal agencies, who would be required to operate under an ever-present potential for unrestrained examination into and disclosure of their ongoing attorney-client communications. That consequence is not necessary for effective criminal law enforcement. Such an impairment of the President's ability to obtain confidential legal advice—and to provide for the availability of legal advice for the Cabinet Officers on whom he relies in executing the laws—should not be left unreviewed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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* Acting Solicitor General Walter Dellinger has recused himself in this case.

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INTEREST OF THE *AMICI CURIAE*

Amici are lawyers and members of the Bar of this Court who have formerly served as Attorney General, Secretary of another Cabinet Department, or Counsel to the President in both Republican and Democratic administrations.[1] In their former official capacities, *amici* frequently sought and received legal advice from other gov-

[1] No counsel for a party is an author of this brief in whole or in part. Other than *amici*, no person or entity made a monetary contribution to the preparation or submission of this brief.

ernment lawyers or, as government lawyers, gave such advice or created work product in anticipation of litigation or congressional investigations.

Amici are filing this brief to urge the granting of the petition because of their concern that the majority opinion below (1) forecloses the availability of the attorney-client privilege to communications between government lawyers and government officials concerning the conduct of government business, at least vis-à-vis a federal grand jury, and (2) forecloses the availability of the lawyer's work product doctrine to the work of government lawyers in anticipation of court litigation or congressional investigations. Written consents of all parties to the filing of this brief have been filed with the Clerk pursuant to Supreme Court Rule 37.2.

REASONS FOR GRANTING THE PETITION

Amici submit that the novel and sweeping ruling of the Court of Appeals flies in the face of *amici*'s previous and widely shared understanding—based on their experience as lawyers serving in the government as well as congressional statutes, case law and the published views of legal scholars—that these privileges apply to communications between government officials and government lawyers, whether on an absolute or qualified basis. *Amici* further submit that (1) unless this ruling is reversed or substantially modified by the Court, government officials will be uncertain as to the confidentiality of such communications, and will therefore be less willing to seek full and frank legal advice from government lawyers concerning official government business, and (2) the ability of government lawyers to give advice or to prepare for litigation or congressional investigations will be curtailed by the unavailability of the work product doctrine. Regardless of how this case is ultimately decided, the importance of these issues to the conduct of the public business justifies the grant of the petition. *See Clinton v. Jones*, 65 U.S.L.W. 4372, 4375 (U.S. May 27, 1997). It is also

important to the public business to develop clear and concise rules applicable to all federal circuits, since government lawyers must deal with these issues under severe time pressures that require them to make quick decisions about the confidentiality of their communications.

ARGUMENT

Executive Branch officials, from the President to his appointed aides and the Civil Service, have to make numerous decisions related to the conduct of their office that require legal advice from government lawyers. Examples are advice as to their constitutional or legislative duty or authority to act, the steps necessary to comply with conflict of interest or ethics laws in particular factual contexts, their response to judicial or legislative subpoenas for documents and testimony, and the drafting and approval of grants and contracts. Failure to obtain and to follow such advice can result in personal civil or criminal liability or in official misconduct or errors of judgment that could cost them their jobs and lower public confidence in the national government of the day.

It is obviously in the public interest to encourage governmental officials to seek legal advice concerning their conduct of the government's business, just as we encourage private citizens and private business organizations to seek such advice. That is why, from time immemorial, the attorney-client privilege has existed.

It is equally in the public interest to encourage government lawyers to create work product in anticipation of litigation or congressional investigations, just as we encourage lawyers for private citizens and businesses to create work product.[2] That is why the lawyer's work product doctrine exists.

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[2] To prepare for such matters, government lawyers need to interview and to prepare government witnesses, to insure proper responses to document requests and subpoenas, and to record their impressions as to the credibility of witnesses, trial and investigation

Until the decision below, *amici* had believed that the attorney-client privilege and the work product doctrine were available to government officials and government lawyers with respect to their conduct of official business, and that any qualification of these privileges with respect to grand jury or criminal trial subpoenas would at least be subject to the protective procedures set forth with respect to claims of Executive privilege in *Nixon v. United States*, 418 U.S. 683 (1981), such as a showing of particularized need and *ex parte* review of the subpoenaed information by a federal judge for relevance and admissibility into evidence. In addition to the authorities cited by petitioner as the basis for this belief, *amici* call attention to Public Law No. 95-521, 2 U.S.C. § 288(f), creating the Office of Counsel to the Senate, which specifically provides that the attorney-client privilege applies to consultations between Senators and Counsel to the Senate.[3] But under the decision below and the argument made by the Independent Counsel, even these qualified protections would not be available.

The Court of Appeals relied on 28 U.S.C. § 535(b) as a "significant" reason for its denial of any government attorney-client privilege in the face of a grand jury subpoena. That statute requires any "information" received in an executive branch agency relating to criminal viola-

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tactics, and their analyses of the factual and legal strengths and weaknesses of the administration's position. On the Independent Counsel's theory, he could even enforce a series of grand jury subpoenas for all work product prepared or to be prepared by White House lawyers in the course of responding to previous grand jury subpoenas or similar demands from congressional investigating committees.

[3] Title 2 U.S.C. § 288(f) reads as follows: "The Counsel and other employees of the Office shall maintain the attorney-client relationship with respect to all communications between them and any Member, officer or employee of the Senate." Another title of this same law created the office of the Special Prosecutor (now the Independent Counsel). Pub. L. No. 95-521, Title VI, 92 Stat. 1824, 1867-74 (1978).

tions by government officers and employees "to be expeditiously reported to the Attorney General by the head of the department or agency." Even if the Court of Appeals correctly characterized this statute as requiring executive branch employees to "report criminal wrongdoing by other employees to the Attorney General" (see Pet. App. 17a), it would not follow that no attorney-client privilege exists for *any and all* communications between a government official and a government lawyer. If the lawyer properly concludes that the communication contains no evidence of "criminal wrongdoing", he or she has no statutory duty to report the attorney-client communication to the Attorney General.[4] If the Independent Counsel issues a grand jury subpoena for every detail of the communication, at least the protective procedures specified in *Nixon* should apply.

In *amici*'s submission, this Court should also review the holding below that no attorney-client privilege for communications between government officials[5] and government counsel exists even when the government official's private counsel is also present and a "common defense" understanding exists between government counsel and private counsel (see Pet. App. 21a-23a). According to the Court of Appeals, the Office of the President and the First Lady lack sufficient common interest for the common defense rule to be applicable: "The OIC's investigation can have no legal, factual, or even strategic effect on the White House as an institution" (*Id.* at 22a). But that is open to serious question when, as here, Independent

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[4] Even under the attorney-client privilege between a private person and his private lawyer, "communications from a client to an attorney about a crime or fraud to be committed are not privileged." *United States v. Bob*, 106 F.2d 37, 40 (2d Cir.), *cert. denied*, 308 U.S. 589 (1939). But this does not mean that no attorney-client privilege exists as to other communications between the lawyer and the client.

[5] *Amici* take no position on the question of whether the First Lady is a government official for this purpose.

Counsel (and congressional) subpoenas are addressed to "The White House", and the Office of White House Counsel has the professional responsibility of accurately responding—a responsibility enforceable by criminal and civil sanctions. In the experience of *amici*, many similar situations arise in which government counsel and private counsel for a government official have a sufficiently common interest, personal as well as institutional, to support a common defense arrangement. When such an arrangement exists, each party must consent to any waiver, and that clearly has not occurred in this case.

Amici recognize that in a case like the present one, questions may arise as to which government office or officer has the authority to invoke or to waive the attorney-client privilege or the lawyer's work product doctrine. In a private corporation, the privileges belong to the corporation itself, and the decision to invoke or to waive is for the board of directors or, by delegation, for the chief executive officer to make. The Executive Branch is an entity analogous to the corporation, but with one fundamental distinction: under Article II all of its authority is vested in a single person—the President. "[A] President, though able to delegate duties to others, cannot delegate ultimate responsibility or the active obligation to supervise that goes with it." *Clinton v. Jones*, 65 U.S.L.W. at 4382 (Breyer, J., concurring). The President is therefore the officer and the Presidency is the office to decide whether to invoke or to waive an Executive Branch privilege against a grand jury subpoena issued to "The White House" or any other entity within the Executive Branch.

In the present case, however, as *amici* understand the ruling below and the position of the Independent Counsel, the issue is not who has the authority to invoke or to waive the attorney-client privilege and the work product doctrine; the question is whether the privilege and the doctrine apply at all to government lawyers and officials in the face of a grand jury subpoena. That question is

surely one for the Judicial Branch to resolve in a proper case or controversy, and this proceeding to compel compliance with a subpoena addressed to "The White House" appears to *amici* to be the appropriate way to resolve it.

The Independent Counsel asserts that in this grand jury investigation and any resulting criminal proceeding, he acts for the "United States" (*i.e.*, the Executive Branch as the enforcer of the criminal laws), but that alone would hardly empower him finally to resolve the issues of whether and how his grand jury subpoena addressed to "The White House" should be enforced. The primary interest of an Independent Counsel is in investigating the single case or set of related criminal cases assigned to him; he is in no position to balance this interest against the need of the unitary Executive Branch for confidential communications between its officers and Executive Branch lawyers. The last word on this issue is not for the Independent Counsel, but for this Court.

CONCLUSION

For the reasons set forth above, *amici* respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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REPLY BRIEF FOR PETITIONER

Based on its untethered notion that federal agencies must "favor disclosure over concealment" (Pet. App. 17a), the court of appeals held that federal governmental entities may not assert *any* attorney-client privilege – whether absolute or qualified – in federal grand jury proceedings. Nor, it added (*id.* at 25a), may they rely on work product protection for legal work performed in anticipation of legislative hearings or grand jury investigations. These rulings are important enough to require prompt review by this Court. They misapprehend well-settled principles of attorney-client privilege (see Law Professors Am. Br.) and, as the Solicitor General has explained, will have a significant adverse impact upon the activities of government lawyers (see U.S. Am. Br.).

The IC nevertheless accuses petitioner of challenging this subpoena not "because an important principle is at stake" but because "these notes reflect communications with Mrs. Clinton" (Opp. 10-11). That is an irresponsible and unfounded accusation. This case is here only because the IC chose *this setting* in which to mount a frontal attack on petitioner's attorney-client and work product privileges by serving a subpoena *duces tecum* targeted *explicitly* to attorney notes of confidential communications. Convinced by the IC, the panel majority has now concluded that no such privilege is available, at least in federal grand jury proceedings and potentially in a far wider range of situations.

White House lawyers historically have proceeded upon the premise that their work enjoys the same status as that of other organizational lawyers, aided by the traditional privileges for lawyer-client communications and work product, the assertion of which is controlled by the agency head. The IC's suggestion that the decision below is so narrow and so novel as to be unworthy of this Court's attention simply ignores reality: the Eighth Circuit's ruling shapes the decisionmaking of every official and every lawyer in the White House during every working day. Before seeking advice or responding to an inquiry from a lawyer, a White House official must now

pause to consider whether every word he speaks will, the next day or the next month, be the subject of an IC subpoena. In these circumstances, will an employee in need of ethical guidance hesitate to seek it or an employee with critical information hesitate to provide it, out of fear that what he says will be divulged at the unfettered and unreviewable discretion of the IC?[1] Will lawyers stop taking notes or preparing memoranda because their work product will simply flow directly to the grand jury? These are now very real questions in the daily business of the White House. So long as they go unanswered, the resulting uncertainty will inevitably constrain the layman's willingness to seek legal advice and the professional's ability to give it – a result that undermines rather than serves the public's interest in honest and effective government.

In sum, the petition should be granted so that governmental entities will know whether their communications with counsel enjoy the protections of traditional privilege rules, are only presumptively privileged (and thus subject to a balancing analysis by the courts, by analogy to *United States* v. *Nixon*, 418 U.S. 683 (1974)), or are freely discoverable on no greater showing than the curiosity of a federal grand jury (as the Eighth Circuit and the IC would have it).

1. Although the IC argues the merits of the case at length (Opp. 11-26), he offers no sound reason for denying certiorari. It is the sheerest self-serving speculation for the IC to assert (Opp. 8) that any delay in producing these notes will leave his investigation "frozen" in its tracks. The IC has

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[1] Indeed, if the decision of the court of appeals stands, White House lawyers, as a matter of professional responsibility, will be required to advise every employee who comes to them for advice or from whom they seek information that the confidentiality of their discussion is entirely dependent on the IC's decision whether or not to demand disclosure.

absolutely no basis for supposing that these notes, made roughly contemporaneously with his own questioning of the First Lady on the same subjects, will have the slightest value to his investigation; and, of course, grand juries get along without such materials in all other contexts. Furthermore, the attorney-client privilege will not stand in the way of the IC's gathering the facts: "The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney." *Upjohn Co.* v. *United States*, 449 U.S. 383, 395 (1981). In fact, the IC has already taken extensive testimony from Mrs. Clinton, and he may seek to do so in the future; he simply may not ask the government's lawyers to hand over their privileged communications with their clients.

Nor does "[t]he novelty of the issue" (Opp. 9) warrant denial of the petition. In the first place, the "issue" is hardly novel: "The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law" (*Upjohn*, 449 U.S. at 389); it has been widely applied to governmental entities, including in at least one federal grand jury proceeding.[2] The only novel aspect of this case is that, as even the IC does not dispute, the privilege has *never before* been held to apply only in some contexts but not others. While these principles have rarely had to be applied in the particular setting at issue here (see Pet. 20-21 n.6), the

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[2] See *In re Grand Jury Subpoena*, 886 F.2d 135 (6th Cir. 1989). Contrary to the IC's suggestion (Opp. 8 n.7), the Sixth Circuit's decision did not turn at all on the fact that "a state agency" was involved. Moreover, the fact that the Sixth Circuit found it unnecessary to undertake substantial analysis to decide that a governmental attorney-client privilege generally applies in a federal grand jury investigation reflects just how deeply that assumption is embedded in the fabric of our law. No doubt that is why the Eighth Circuit felt constrained to note (Pet. App. 9a) its explicit disagreement with the Sixth Circuit's "unpersuasive" decision.

building blocks of the analysis are, to quote the IC (Opp. 16), "historically rooted" and "recognized in the vast majority of the States."

In any event, novelty, under these circumstances, is no reason to deny the petition, for the reasons recently explained in *Clinton* v. *Jones*, No. 95-1853, slip op. 6-7 (May 27, 1997). Indeed, the need for review is far greater here, because substantial reliance interests are at stake: government lawyers, and their institutional clients, rely on certain assumptions regarding the protections afforded their legal advice-giving functions. If those assumptions are to be materially altered to conform to the Eighth Circuit's ruling, prompt and definitive explanation of the nature of the new rules is essential.[3]

Finally, there is nothing "narrow," much less "exceedingly narrow" (Opp. 9), about the majority's decision. Even if the court of appeals' decision could be confined, as the IC surmises (*ibid.*), to "federal criminal proceedings," the issue would hardly be a narrow one. The proliferation of Independent Counsel investigations ensures that this will be a recurring concern not only for this but for future Administrations. Moreover, as noted in the petition (at 16-17), the majority's reasons for rejecting the governmental attorney-client privilege are not easily limited to the grand jury

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[3] The actions of lawyers in previous Administrations evidence the widely-held belief that the attorney-client privilege may be asserted by executive branch agencies in this context. Then-White House Counsel Boyden Gray, for example, on several occasions asserted the President's attorney-client privilege in the Iran-Contra investigation. See Walsh, FIREWALL 271 (1997); FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS 479 n.65 (Aug. 4, 1993).

setting.[4] And the majority's restrictions on the scope of the work product protection – including in particular its conclusion that contentious legislative hearings do not constitute "litigation" for purposes of the doctrine – would have dramatic practical consequences, not only for any Executive facing a Congress controlled by the opposite party but even with respect to legal work done by private lawyers to assist private clients embroiled in legislative proceedings.[5]

More fundamentally, however, the IC's effort to confine the impact of the panel's decision to "federal criminal proceedings" ignores the fact that government lawyers and their clients – especially those dealing with matters related in any way to pending or possible future IC investigations – can have no advance assurance that a grand jury will not one day

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[4] For example, although the IC asserts (Opp. 9) that "[t]he court of appeals' decision is entirely consistent with recognition of governmental attorney-client and work product privilege in federal civil proceedings," he adopts the majority's analogy of government lawyers as "auditors" and yet fails to explain how that analogy can sensibly be limited to the grand jury arena. And the mere fact that there is a set of rules and principles that govern *certain* aspects of federal criminal discovery (see Opp. 9 n.8) would not foreclose criminal defendants from seeking attorney-client communications under the general subpoena power vested in *all* criminal litigants, including defendants, by Fed. R. Crim. P. 17 (a rule omitted from the IC's list in footnote 8).

[5] The IC barely addresses work product, stating (Opp. 28) only that there is "no case law support" for the proposition that congressional proceedings may constitute litigation for purposes of the doctrine. He is mistaken. See, *e.g.*, *In re Air Crash Disaster at Sioux City, Iowa*, 133 F.R.D. 515, 526 (N.D. Ill. 1990) (drafts of letter to a member of Congress concerning questions posed at a hearing constitute protected work product); *United States* v. *Davis*, 131 F.R.D. 391, 406-406 (S.D.N.Y. 1990) (documents created at time of congressional investigation constitute work product).

take an interest in their communications. As the Law Professors explain (Am. Br. 10 n.6), "because [t]he focus is on encouraging communication *ex ante*, the essence of the privilege goes to the need for candor and full access to information at the time the communication is made, not to the need for the information after the communication is made." The majority's flat rejection of a governmental attorney-client privilege in this setting thus will affect a wide array of attorney-client communications, including the overwhelming majority that are useful but completely innocuous, simply because they may one day become the subject of IC curiosity. These problems are especially acute when government officials are individually represented by private counsel, who will be extremely cautious in permitting their clients to speak to government lawyers about their official conduct.

2. a. On the merits, the IC's main contention is that 28 U.S.C. § 535(b) requires petitioner to disclose the subpoenaed notes to the federal grand jury. The court of appeals, it should be noted, referred to Section 535(b) only in passing (Pet. App. 17a); yet it is now so much the centerpiece of the IC's presentation that he has drastically rewritten (and distorted) our Questions Presented.

In any event, there is not the least indication that Congress intended Section 535(b) to play the role the IC would assign to it or to overcome traditional privileges.[6] The IC's selective citation (Opp. 13, 15) to the legislative history of Section 535(b) is misleading. The statute was intended

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[6] It is doubtful that Section 535(b) even applies to petitioner, because the Executive Office of the President and its components are neither "departments" nor "agencies" as defined in 5 U.S.C. §§ 101 and 105. See *Haddon* v. *Walters*, 43 F.3d 1488 (D.C. Cir. 1995). The IC is wrong in asserting (Opp. 14 n.16) that the White House has conceded the applicability of Section 535(b). It is the IC who has never before claimed that petitioner is violating Section 535(b).

principally to eliminate a "jurisdictional conflict of authority" that had inhibited the ability of the FBI and the Department of Justice to investigate crimes allegedly committed by Treasury employees. See H.R. Rep. 2622, 83d Congress., 2d Sess., *reprinted in* 1954 USSCAN 3551. Under previous administrations, only the Department of the Treasury could conduct the initial investigation of its own personnel, and Treasury had "refused to permit" the FBI access to witnesses and documents. Section 535(b) was meant simply to make clear that the Attorney General "ha[d] the *authority* to investigate any violation of the criminal statutes involving Government officers and employees" (*id.* at 3552, emphasis added) – and nothing more. Even the snippet that the IC quotes (at 13) from the testimony of Deputy Attorney General Rogers confirms that it was access "to all units" of government – not to all information, privileged or not – that the legislation sought to achieve.

That said, the Office of the President, as a matter of policy and in recognition of the constitutional duty to execute the laws, embraces the principles embodied in Section 535(b), and on various occasions has referred information to the Attorney General reflecting the possible commission of a criminal offense – including information otherwise protected by attorney-client privilege. The IC does not have the slightest basis to believe that petitioner has abandoned that policy here, or that some "alleged irregularities" have come to petitioner's "attention" by virtue of these confidential communications (Opp. 13) but have not been reported.

It is one thing, however, to agree (as we all do) that the Office of the President has a duty, recognized in official policy and practice, to turn over evidence of a crime; it is quite another to insist (as the IC does) that Section 535(b) – a statute that was enacted merely to settle a narrow jurisdictional dispute between agencies and that has always been interpreted by the Office of Legal Counsel to have no bearing on privilege – empowers the IC unilaterally to strip from

Executive Branch entities their right to a privileged relationship with their attorneys.[7]

b. The IC's remaining defenses of the result (if not the logic) of the majority's ruling are largely makeweight. Although the public assuredly "'has a right to every man's evidence,'" (Opp. 16), this Court pointedly noted in *Nixon* that there is an exception to that principle for "common-law * * * privileges," including for "an attorney or a priest[, who] may not be required to disclose what has been revealed in professional confidence." 418 U.S. at 709. Similarly, the IC's concern (Opp. 20) that wrongdoing might remain hidden if a privilege were honored ignores the truism that the privilege protects only communications with counsel, not the underlying facts themselves. And the IC's optimistic prediction (Opp. 21) that agencies' efforts to gather facts will be unaffected by the demise of the privilege ignores the central premise of the privilege – that clients must have a satisfactory degree of confidence regarding the confidentiality of their communications with counsel or else attorneys will not receive full cooperation and clients' interests will be poorly served.

Finally, it is the panel majority, not petitioner, whose position "contravenes this Court's decision in *Nixon*" (Opp. 18). By its terms, *Nixon* requires a "demonstrated *specific* need" for evidence sufficient to persuade the trial court that the subpoenaed material is "'*essential* to the justice of the [pending criminal] case'" before presumptively privileged government materials may be released in response to a subpoena. Under the majority's ruling, however, the IC

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[7] If Section 535(b) were as "clear and all-encompassing" (Opp. 12) as the IC asserts, it is hard to understand why the statute received no attention from this Court in connection with President Nixon's claims of executive privilege. See *BankAmerica Corp.* v. *United States*, 462 U.S. 122, 131 (1983).

would not have to make *any* showing of need before insisting on production of privileged materials. By the majority's lights, the attorney-client privilege is not even a qualified privilege (analogous to executive privilege in *Nixon*). It simply has no force at all – just as if government attorney-client communications had the status of a chat with a bartender or a barber.[8]

3. The critical issue for this Court – which the IC tries to obscure – is not whether communications between a government attorney and client enjoy an absolute or a qualified privilege, but whether, as the Eighth Circuit held, they are subject to *no privilege at all.* In the Eighth Circuit's view, it is the Independent Counsel, rather than the President of the United States or the courts, who alone has the power to weigh the competing governmental interests in effective lawyering and criminal law enforcement. We submit that the IC, an "inferior officer" (see *Morrison* v. *Olson,* 487 U.S. 654 (1988)) with a sharply limited area of responsibility and an obvious institutional bias, is functionally incapable of striking a true balance between those interests. Cf. *Coolidge* v. *New Hampshire*, 403 U.S. 443, 449-453 (1971).

In an era of increasingly complex legal duties, of ever-intensifying legislative and prosecutorial oversight, and of burgeoning litigation with private parties, the Executive Branch should not be denied a prompt and definitive resolution of the scope of its right to have confidential consultations with its attorneys, free from the concern that those consultations may someday be compromised on no greater showing

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[8] The IC's suggestion (Opp. 24) that we did not "see fit to advance" this reading of *Nixon* in the courts below is mistaken. See White House C.A. Br. 35 n.15.

of need than the IC has made in this case – to wit, none at all. The petition for a writ of certiorari should be granted.[9]

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[9] Contrary to the IC's suggestion (Opp. 26), Mrs. Clinton assuredly *is* "a representative of the client under *Upjohn*" (Br. 26), as the district court correctly found (Pet. App. 71a-72a). In any event, that is an issue that the court of appeals would be free to consider on remand if this Court sets aside its broader ruling that, regardless of Mrs. Clinton's status, there simply is no governmental attorney-client privilege in the grand jury context. The IC is likewise wrong in contending (Opp. 27-28) that petitioner may have waived the privilege that would otherwise protect its communications with the First Lady by interviewing her in meetings that included her private counsel (with whom she also and simultaneously could make the same privileged communication). The common interest protection is easily broad enough to preclude a waiver under these circumstances. See American Bar Association, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 48-50 (1989). And the availability of the privilege in this situation is very much encompassed within the Questions Presented. See Pet. i. Finally, it would be entirely appropriate for this Court to reverse the decision below either on the district court's rationale (see Pet. App. 80a) that enforcement of the subpoena would be inconsistent with the parties' reasonable expectations about the privileged nature of the communications or because the decision should have been given prospective effect only. See Pet. i.

Respectfully submitted.

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In The

Supreme Court of the United States

OCTOBER TERM, 1996

OFFICE OF THE PRESIDENT,
Petitioner,

v.

OFFICE OF INDEPENDENT COUNSEL, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF LAW PROFESSORS PAUL F. ROTHSTEIN, RONALD J. ALLEN, MARGARET A. BERGER, WILLIAM J. BRIDGE, PAUL C. GIANNELLI, STEPHEN GILLERS, LAIRD C. KIRKPATRICK, DAVID P. LEONARD, MIGUEL A. MÉNDEZ, ROGER C. PARK, MYRNA S. RAEDER, JOHN W. REED, MARK REUTLINGER, LEO M. ROMERO, STEPHEN A. SALTZBURG, AND PETER TILLERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Amici are law professors who regularly conduct scholarly research in, publish on, and teach the subjects of evidence or professional responsibility in law schools throughout the Nation. *Amici* law professors have written extensively on issues relating to the attorney-client privilege, and several have written or edited leading textbooks and treatises on the law of evidence or professional responsibility. In addition, many *amici* have had practical experience on both sides of civil and criminal cases; experience working as attorneys in government offices or agencies; and experience teaching evidence to the bench and bar.

Amici have a professional interest in and concern for the effective workings of the courts, government, and the legal profession. In particular, *amici* have an interest in the integrity and soundness of rules of evidence and privilege as they may affect the processes by which public policy, law, and regulations are made. As teachers of law, *amici* are also students of the legal profession and the contribution it makes to our system of government. These interests are heightened when the subject is, as in this case, the application of the attorney-client privilege in the context of government agencies and attorneys.

Brief biographical statements of individual *amici* are included in an Appendix to this brief. All parties have consented to the filing of this brief.

REASONS FOR GRANTING THE WRIT

This Court should grant review not only because this is a case of national importance and prominence, but also because the decision below is a conspicuous departure from settled principles of evidence law. The panel majority concluded that communications between government lawyers and government officials are not protected by the attorney-client privilege, at least when those communications are sought by a federal grand jury. That conclusion conflicts with the predominant common-law understanding that the attorney-client privilege applies to government entities and that where the privilege applies, it is absolute (*i.e.*, it protects against disclosure in all types of legal and investigative

proceedings). In particular, the Court of Appeals' decision rests on a fundamental misunderstanding of this Court's decisions in *Upjohn Co. v. United States*, 449 U.S. 383 (1981), and *United States v. Nixon*, 418 U.S. 683 (1974).

Moreover, this case warrants further review because the decision below has profound implications beyond the parties to this dispute. The Court of Appeals' ruling, if allowed to stand, will create widespread uncertainty among federal, state, and local officials concerning the extent to which their communications with their agency lawyers, for the purpose of seeking legal advice in the conduct of governmental affairs, are protected by the attorney-client privilege. Unless this Court grants review and resolves this uncertainty, the decision below will likely have an adverse effect on the current and future operation of not only the Office of the President of the United States, but also government at all levels. At the very least, a decision of such vast implications (as in the present case) should be made by the highest court in the land. We accordingly urge the Court to grant the petition for review.[1]

I. THE DECISION BELOW CREATES AN EXCEPTION TO THE ATTORNEY-CLIENT PRIVILEGE THAT IS NOT IN ACCORD WITH ACCEPTED LEGAL PRINCIPLES AND HAS IMPORTANT ADVERSE CONSEQUENCES FOR GOVERNMENT

A. It Is Well-Settled That The Attorney-Client Privilege Applies To Government Entities

Rule 501 of the Federal Rules of Evidence provides, with limited exceptions, that "the privilege of a witness, person, government, State, or political subdivision thereof shall be governed

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[1] Because this brief urges the Court merely to grant further review, *amici* do not address in this brief the question whether, assuming the attorney-client privilege applies to government entities and is absolute, the requirements for asserting the privilege have been satisfied in this case. Those questions are more appropriately addressed if and when this Court elects to grant certiorari. *Amici* also do not address in this brief the attorney work-product issue raised by petitioner.

Pursuant to Supreme Court Rule 37.6, this certifies that this brief was prepared in its entirety by *amici curiae* and their counsel. Counsel for the parties did not author this brief in whole or in part. No person or entity other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." As the court below recognized (Pet. App. 5a), the starting point of analysis is therefore the common law, "interpreted . . . in the light of reason and experience." Fed. R. Evid. 501.

At common law, it has long been understood that the attorney-client privilege applies to communications between government entities and government lawyers for the purpose of seeking and providing legal advice. *See, e.g.*, Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence Manual* ¶ 18.03[02][a], at 18-18 (1996) ("Artificial entities, public or private, are . . . considered clients for purposes of the attorney-client privilege."); Paul R. Rice, *Attorney-Client Privilege in the United States* § 4:28, at 4-98 (1993) ("When government agencies consult with legal counsel for the purpose of obtaining legal advice or assistance . . . the attorney-client privilege protects [their] communications to those attorneys."); 1 Scott N. Stone & Robert K. Taylor, *Testimonial Privileges* § 1.18, at 1-47 (2d ed. 1995) ("Courts agree that the client may be an . . . organization or entity, either public or private.") (footnotes omitted); Richard O. Lempert & Stephen A. Saltzburg, *A Modern Approach to Evidence* 693 (2d ed. 1982) ("The proposed federal rule and most of the rules that have been enacted by states which used it as a guideline assume that a client can be a government agency as well as a corporation.").[2]

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[2] In *SEC v. World-Wide Coin Investments, Ltd.*, 92 F.R.D. 65, 67 (N.D. Ga. 1981), for example, the court applied the principles of this Court's *Upjohn* decision to communications between SEC staff and SEC counsel. And in *Deuterium Corp. v. United States*, 19 Cl. Ct. 697, 699 (1990), the court concluded that the "same reasoning" that this Court employed in *Upjohn* applies to "Government employees at all levels." In addition to the cases cited by petitioner in its Petition for Certiorari ("Pet."), *see* Pet. 18 n.5, other cases that recognize a governmental attorney-client privilege include *Connecticut Mut. Life Ins. Co. v. Shields*, 18 F.R.D. 448, 450 (S.D.N.Y. 1955) (communications between bridge commission and its attorneys held to be privileged), *State v. Today's Bookstore, Inc.*, 621 N.E.2d 1283, 1288 (Ohio Ct. App. 1993) ("The city is like a corporation, and the same attorney-client privilege enjoyed by

Although the issue has typically arisen in the context of civil litigation, we are aware of no reported decision (prior to this one) that suggests a different rule applies in criminal or grand jury proceedings. Any such distinction would be a departure from a fundamental feature of the attorney-client privilege; namely, that the privilege protects against compelled disclosure regardless of the forum in which the privileged communication is sought. *See infra* pp. 6-9. Indeed, the few decisions that have confronted the issue in a criminal setting have recognized the existence of the privilege. *See In re Grand Jury Subpoena*, 886 F.2d 135, 138-39 (6th Cir. 1989) (vacating district court's order to enforce a federal grand jury subpoena and remanding to determine whether minutes of a city council meeting were confidential); *In re Grand Jury Subpoenas Duces Tecum Served by the Sussex County Grand Jury*, 574 A.2d 449, 454-56 (N.J. Super. Ct. App. Div. 1989) (attorney employed by a county board of freeholders cannot be required to reveal client communications to a grand jury investigating the county).[3]

Apart from judicial decisions, the Freedom of Information Act ("FOIA") expressly recognizes that an attorney-client privilege exists between government agencies and their lawyers. *See* 5 U.S.C. § 552 (1994); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 154 (1975); *Mead Data Central, Inc. v. United States Dep't of Air Force*, 566 F.2d 242, 252-53 (D.C. Cir. 1977). Although the panel majority below dismissed FOIA jurisprudence as "sui

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corporations is enjoyed by the city."), and *Rowley v. Ferguson*, 48 N.E.2d 243, 248 (Ohio Ct. App. 1942) (communications between attorney and client, both of whom were public officials, held to be privileged).

[3] It should not be surprising that there are few reported judicial decisions in the criminal or grand jury context, because the decision whether to waive attorney-client privilege in the context of a criminal or grand jury proceeding is often made within the Executive Branch. *See* Pet. 20 n.6. In addition, *amici* surmise that one reason this issue is not litigated more frequently is that, in the past, lawyers, judges, and scholars had no reason not to assume — or reasonably took for granted — that government agencies, no less than other entities, could assert the attorney-client privilege in the face of a criminal or grand jury investigation.

generis," Pet. App. 10a, it would have been singularly odd for Congress, which is presumed to be well-versed in this area of the law, to recognize an attorney-client privilege in the FOIA context if the general rule were that no such privilege exists.

Furthermore, Proposed Federal Rule of Evidence 503 provides that any "organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him," is entitled to the protection of the attorney-client privilege. Proposed Fed. R. Evid. 503(a)(1), *reprinted in* 56 F.R.D. 183, 235 (1972).[4] The Advisory Committee Notes to Proposed Rule 503 confirm that "[t]he definition of 'client' includes governmental bodies." *Id.* at 237 (citations omitted). Although the panel majority's analysis began with Proposed Rule 503, it abandoned further consideration on the curious ground that the Proposed Rule announces a "broad proposition" without specifically addressing "the particular situation before us in this case." Pet. App. 6a-7a. Courts usually do not disregard plain language in a statute or rule on the basis that the text speaks in general terms.

More importantly, Proposed Rule 503 has been recognized as "a powerful and complete summary of black-letter principles of lawyer-client privilege. Perhaps more than any other privilege proposal that was contained in the draft rules presented to Congress, Standard 503 represents a convenient and logical summary of core principles in privilege doctrine." 3 *Weinstein's Federal Evidence* § 503.02, at 503-8 (McLaughlin ed., 2d ed. 1997). Because Proposed Rule 503 "is useful as a restatement of the traditional

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[4] Although Rule 503 is a proposed rule, and therefore not binding on the courts, its pedigree makes it a persuasive authority. *See, e.g.*, Weinstein's Evidence Manual ¶ 18.03[01], at 18-17 ("Standard 503 remains a useful starting point in examining the use of the attorney-client privilege in the federal courts today. It is an accurate restatement of actual practice and is cited to frequently") (footnote omitted); *In re Bieter Co.*, 16 F.3d 929, 935 (8th Cir. 1994) (Proposed Rule 503 is "a useful starting place" for examination of the federal common law of attorney-client privilege).

common law lawyer-client privilege that had been applied in the federal courts prior to the adoption of the federal rules," *Weinstein's Federal Evidence*, *supra*, § 503.02, at 503-8 (footnote omitted), the court below should have viewed Proposed Rule 503 as persuasive (though not dispositive) authority that federal common law, interpreted "in the light of reason and experience," Fed. R. Evid. 501, includes a governmental attorney-client privilege.[5]

B. The Purposes Served By The Attorney-Client Privilege Apply With Full Force To Communications Between Government Entities And Government Lawyers

The attorney-client privilege is a long-recognized exception to the general rule that the public has a right "to every man's evidence," *United States v. Bryan*, 339 U.S. 323, 331 (1950) (internal quotation and citation omitted). Indeed, it "is the oldest of the privileges for confidential communications known to the common law." *Upjohn*, 449 U.S. at 389 (citing 8 John H. Wigmore, *Evidence* § 2290 (McNaughton rev. 1961)). The purpose of the privilege is to

> encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of the law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves

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[5] Other authorities also recognize a government attorney-client privilege. *See, e.g.*, Restatement (Third) of the Law Governing Lawyers § 124 (Proposed Final Draft No. 1, 1996) ("The attorney-client privilege extends to a communication of a governmental organization."); Uniform Rule of Evidence 502 (defining "client" to include governmental bodies and public officers; subsection (d)(6), which restricts the scope of the privilege, has been rejected by most States, *see infra* note 10); Model Rules of Professional Conduct 1.6 comment ("The requirement of maintaining confidentiality of information relating to representation applies to government lawyers . . ."); *cf.* Earl C. Dudley, Jr., *Federalism and Federal Rule of Evidence 501: Privilege and Vertical Choice of Law*, 82 Geo. L.J. 1781, 1841 (1994) (proposing a new Federal Rule of Evidence 501 that includes a governmental attorney-client privilege).

> public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.

Id. The attorney-client privilege "'rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out.'" *Id.* (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980)). Its purpose is "to encourage clients to make full disclosure to their attorneys." *Id.* at 389 (quoting *Fisher v. United States*, 425 U.S. 391, 403 (1976)); *see also Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348 (1985).

In *Upjohn*, the Court rejected a narrow application of the attorney-client privilege to corporations, concluding that the narrow "control group" test "overlook[ed] the fact that the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." 449 U.S. at 390 (citations omitted). The *Upjohn* Court recognized that "[t]he first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant. . . . 'It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant.'" *Id.* at 390-91 (quoting ABA Code of Professional Responsibility, Ethical Consideration 4-1).

This Court in *Upjohn* also recognized that "if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege . . . is little better than no privilege at all." *Upjohn*, 449 U.S. at 393. *Upjohn* thus affirmed the central principle that the attorney-client privilege, where it exists, is absolute and cannot be overcome by a showing of need. *See, e.g.*, Rice, *supra*, § 2.2, at 2-50 ("If the protection were not absolute, it would not be predictable, and the client could not rely on it. Absent a waiver of the protection, therefore, the privilege precludes disclosure of the communications

regardless of the need that might be demonstrated for the information in them") (footnotes omitted).[6]

The purposes served by the attorney-client privilege in the corporate setting apply with equal force in the government setting. *See* Rice, *supra*, § 4:45, at 4-175 (government agencies "need legal advice and assistance, and the privilege's rationale of encouraging more open communications from the client to the attorney is no less applicable, even though these entities can only speak and act through the individuals who represent them"). Government lawyers, no less than lawyers serving private clients, need to know all relevant facts before providing legal advice. The need to promote full and frank disclosure between clients and their lawyers is no less pressing in the government context than in the private context.[7]

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[6] The focus on encouraging the communication *ex ante* means that the privilege derives its justification independently of the context in which the information is sought *ex post*. In other words, given the rationales supporting the attorney-client privilege, there is no principled basis on which to distinguish between privileged information sought later in a criminal investigation or in civil litigation. Moreover, because the focus is on encouraging communication *ex ante*, the essence of the privilege goes to the need for candor and full access to information at the time the communication is made, not to the need for the information after the communication is made. In creating an exception to the attorney-client privilege for communications sought by a federal grand jury, the court below appears to have ignored this bedrock principle of privilege law.

[7] "The United States government employs more than 22,000 lawyers to handle its legal problems (two to three percent of all U.S. lawyers). . . . The variety of legal work performed by government lawyers is nearly as broad as the breadth of legal activity generally. Lawyers for the federal government are advisors, counselors and litigators; and they deal virtually in every legal specialty, ..." Roger C. Cramton, *The Lawyer as Whistleblower: Confidentiality and Government Lawyers*, 5 Geo. J. Legal Ethics 291, 292 (1991). "Recognition of the attorney-client privilege for governmental entities is said to encourage more open communication between governmental officials and their lawyers, thereby enhancing the quality of governmental decisionmaking. Denial of the privilege would put

This Court in *Upjohn* recognized that a corporation's lawyers cannot function effectively for a corporation without the information provided by employees of the corporation, and that in the absence of privilege such information might be withheld from the lawyers to the detriment of the corporation, the legal system, and the public generally. *See Upjohn*, 449 U.S. at 390-95. The same is true of lawyers for government agencies. Legal advice is just as essential to a government agency's proper functioning as it is to a corporation's. Legal advice can be key to the agency's understanding of and obedience to the law, and key to the agency's formulation of sound public policy and sound legal regulations. Legal advice for a government agency is particularly necessary in the modern world's increasingly complex and sometimes counterintuitive laws governing agencies and their officials. As this Court observed in *Upjohn*, "[i]n light of the vast and complicated array of regulatory legislation," efforts to comply with the law will require "'constantly go[ing] to lawyers to find out how to obey the law,' particularly since compliance with the law in this area is hardly an instinctive matter." 449 U.S. at 392 (citations omitted). There can be little dispute that this observation applies with at least equal force to government agencies. At bottom, just as this Court recognized in the context of corporate attorney-client communications in *Upjohn*, application of the attorney-client privilege in a governmental context promotes, rather than impedes, the fair and accurate administration of justice.

C. The "Grand Jury Exception" Created Below To The Governmental Attorney-Client Privilege Erodes The Benefits Of The Privilege So Severely That Only The Nation's Highest Court Should Make That Decision

The panel majority below rejected the proposition that "an entity of the federal government may use the attorney-client privilege to avoid complying with a subpoena [issued] by a federal grand jury." Pet. App. 5a. But just as limiting the privilege to

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public entities at an unfair disadvantage in both criminal prosecutions and civil litigation." 2 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence Second* § 191, at 352 (1994).

members of a corporation's "control group" would "frustrate[] the very purpose of the privilege," *Upjohn*, 449 U.S. at 392, so too would the decision of the court below to remove communications from the governmental attorney-client privilege when they are sought in a grand jury proceeding deny the essence of the privilege for the governmental entity.

The panel majority assumed that "confidentiality will suffer only in those situations that a grand jury may later see fit to investigate." Pet. App. 19a.[8] But grand jury investigations of governmental decisionmaking and decisionmakers are (unfortunately) no longer uncommon, and there can thus be considerable uncertainty whether a future grand jury may someday be interested in otherwise privileged communications. As this Court recognized in *Upjohn*, "if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected." *Upjohn*, 449 U.S. at 393; *see also Jaffee v. Redmond*, 116 S. Ct. 1923, 1932 (1996) ("We reject the balancing component of the privilege . . . . Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the . . . evidentiary need for disclosure would eviscerate the effectiveness of the privilege."); *cf.* Paul F. Rothstein, *A Re-Evaluation of the Privilege Against Adverse Spousal Testimony in the Light of Its Purpose*, 12 Int'l & Comp. L.Q. 1189, 1194 (1963) (contrasting communications privileges, which require certainty of applicability, with other privileges, which do not). Given the broad

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[8] The court below also asserted that it did not

> foresee any likely effect of our decision on the ability of a government lawyer to advise an official who is contemplating a future course of conduct. If the attorney explains the law accurately and the official follows that advice, no harm can come from later disclosure of the advice. . . . [W]e cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution.

Pet. App. 19a-20a (citation omitted).

investigative mandate of federal grand juries, the uncertainty as to whether otherwise protected communications may lose that protection will frustrate the very purpose of the privilege.

Indeed, denial of the attorney-client privilege in the grand jury context would be an unprecedented exception to the privilege. There is no "grand jury exception" to the attorney-client privilege for individuals or corporations. A grand jury exception to the attorney-client privilege in the government context would cut a gaping hole in the privilege and would have a significant chilling effect on communications. Federal grand juries can investigate a wide range of conduct or suspected conduct and are not limited by relevancy rules applicable at trial. *See, e.g., United States v. Calandra*, 414 U.S. 338, 343-44 (1974). Thus, a government employee speaking with agency counsel about matters necessary to the daily effective functioning of the agency would not necessarily know if the matter could possibly be of interest one day to a federal grand jury. The fear that it *might*, however, would undoubtedly chill communications with agency attorneys. In addition, if the attorney-client privilege did not apply to government agencies in the context of federal grand jury investigations, every agency lawyer could become a potential prosecution witness against agency officials who have sought legal advice from that lawyer or against government employees who have provided information necessary for that lawyer to offer such advice.

As a result of both these implications, government officials and employees would likely be deterred from seeking legal advice regarding the legality of their conduct, which would have several undesirable effects. First, it might encourage agency officials and employees to remain deliberately ignorant of the law. Second, it might deter some officials or employees from engaging in proper and desirable conduct for fear that it might be illegal. Also, it might cause government agencies to establish policies they might not establish had officials obtained confidential legal advice, or to engage in conduct they might have eschewed had officials consulted government counsel about their proposed course of conduct. Those government officials who do actually seek legal advice might decide to withhold crucial information or otherwise refrain from free and

frank exploratory discussions, thus undermining the quality and effectiveness of any legal advice that is ultimately given.

This uncertainty over the prospect of a future grand jury investigation that would require disclosure of otherwise privileged communications is compounded by other uncertainties raised by the decision below. For example, unless this Court grants review and announces a uniform rule, there will be uncertainty over whether other courts will follow the court below and, if so, whether a future grand jury will seek such communications in those jurisdictions. There will be uncertainty over whether the rule announced by the court below might also apply to other types of proceedings, such as criminal trials or civil proceedings. The decision below also raises substantial uncertainty as to whether the same exception would apply to state or local government agencies and officials and, if so, whether a future grand jury will seek such communications in a jurisdiction that applies the "grand jury exception" created below to state and local government agencies and officials. *Cf.* Paul F. Rothstein, *The Proposed Amendments to the Federal Rules of Evidence*, 62 Geo. L.J. 125, 130-35 (1973) (urging general conformity of privileges with state law to avoid uncertainty). These uncertainties, each of which tends to undermine the very existence of the privilege, *see Upjohn*, 449 U.S. at 393, present an independent, compelling basis on which this Court should grant review.

D. A "Grand Jury Exception" To The Governmental Attorney-Client Privilege Pays Far Fewer Dividends to Grand Jury Investigations Than The Court Below Assumed

The decision below sought to distinguish application of the privilege in a civil setting from application of the privilege in a criminal setting by advancing "the general principle that the government's need for confidentiality may be subordinated to the needs of the government's own criminal justice processes." Pet. App. 15a (discussing *United States v. Nixon*, 418 U.S. 683 (1974)). The panel majority also cited *Nixon* to support its conclusion that "[e]ven if . . . the governmental attorney-client privilege ordinarily

applies in civil litigation," a different rule is warranted in criminal proceedings. Pet. App. 11a.

At the outset, the panel majority's conclusion rests on a fundamental misreading of *Nixon*. This Court's opinion in *Nixon* expressly distinguished the *qualified* privilege at issue in that case from *absolute* privileges, such as those that apply to military or diplomatic secrets. 418 U.S. at 706-07. *Nixon* did not suggest that the attorney-client privilege, which has long been regarded as an absolute privilege, is subject to a balancing analysis. To the contrary, the Court expressly acknowledged the existence of "common-law . . . privileges," including the privilege of "an attorney" who "may not be required to disclose what has been revealed in professional confidence." 418 U.S. at 709. Furthermore, there was a much stronger showing of need for the evidence in *Nixon*. In *Nixon*, the information at issue was not available from any other source, because the relevant individuals could not be called as witnesses in a criminal trial. In this case, by contrast, the Independent Counsel has other sources for the information he seeks. Because Mrs. Clinton has already testified before the grand jury, for example, the Independent Counsel's need for counsel's debriefing notes related to that testimony is far less pressing than the Special Prosecutor's need for the tapes in *Nixon*.

More importantly, even apart from the panel majority's misreading of *Nixon*, the decision below overestimates the potential benefits to law enforcement from denial of a governmental attorney-client privilege in the context of grand jury proceedings. First, it is well-established that "[t]he privilege only protects disclosure of *communications*; it does not protect disclosure of the underlying *facts* by those who communicated with the attorney." *Upjohn*, 449 U.S. at 395 (emphasis added). As such, recognition of the privilege in the context of a grand jury subpoena does not and would not prevent the Independent Counsel (or some future party seeking grand jury evidence) from obtaining the underlying information from sources other than attorney-client communications. *See id.* at 396 ("While it would probably be more convenient for the Government to secure the results of petitioner's internal investigation by simply subpoenaing the questionnaires and notes taken by petitioner's attorneys, such considerations of convenience

do not overcome the policies served by the attorney-client privilege."). In this case, for example, because Mrs. Clinton has already testified before a grand jury, the Independent Counsel presumably has had ample opportunity to question her about underlying facts relevant to his investigation. What the attorney-client privilege protects — in this as in any other context — are confidential communications where there is an overarching public benefit in "encourag[ing] full and frank communication between attorneys and their clients [to] promote broader public interests in the observance of the law and administration of justice." *Upjohn*, 449 U.S. at 389.

Second, as this Court and others have recognized, the privilege does not serve to suppress evidence; rather, the privilege serves to encourage communications from the client to the attorney that otherwise might not have been uttered. *Cf. Jaffee*, 116 S. Ct. at 1929 ("Without a privilege, much of the desirable evidence to which litigants . . . seek access . . . is unlikely to come into being. This unspoken 'evidence' will therefore serve no greater truth-seeking function than if it had been spoken and privileged").[9] Thus, even apart from the significant adverse effect on governmental operations that is likely to occur, denial of the governmental attorney-client privilege for grand jury investigations provides no commensurate benefits for the administration of justice.

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[9] The privilege "keeps from the court only sources of information that would not exist without the privilege." Rice, *supra*, § 2:3, at 56-57 (quoting *Developments in the Law: Privileged Communications*, 98 Harv. L. Rev. 1501, 1508 (1985)). As such, "when the attorney-client privilege is properly understood, it reaches communications that are presumed to have been made precisely because the privilege exists. . . . It is not accurate, therefore, to say that the privilege operates in derogation of the truth. . . . [I]t is important, in understanding the privilege, to focus on the time period before the communications are made." Stephen A. Saltzburg, *Corporate Attorney-Client Privilege in Shareholder Litigation and Similar Cases: Garner Revisited*, 12 Hofstra L. Rev. 817, 823-24 (1984); *see also* Stephen A. Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 Va. L. Rev. 597, 600 n.9 (1980) (courts should recognize the information-generating effect of a privilege).

II. THE COURT OF APPEALS' DECISION RAISES A SERIOUS ISSUE OF FEDERALISM

The panel majority's decision also raises significant federalism concerns. Federal Rule of Evidence 501 provides that state law governing attorney-client privilege does not apply in the federal courts, except in civil actions and proceedings "with respect to an element of a claim or defense as to which State law supplies the rule of decision." Fed. R. Evid. 501. Accordingly, if state law provides that communications between state government officials and state government lawyers are protected by the attorney-client privilege, that *state* law will not be applied in federal criminal or grand jury proceedings or in federal civil actions that arise under federal law. Any protection in those proceedings is entirely dependent on the shape of *federal* privilege law. *See generally* Paul F. Rothstein, *Rules of Evidence for United States Courts and Magistrates* 139-40 (2d ed. 1996).[10]

This case concerns the federal government rather than a state government, and the panel majority itself recognized that "a standoff between a federal grand jury and a city government[] implicates potentially serious federalism concerns." Pet. App. 9a. But the Court of Appeals' reasoning denying privilege to the federal government applies as well to state and local governments. Having concluded (Pet. App. 18a) as a matter of federal common law that "the strong public interest in honest government and in exposing wrongdoing by public officials would be ill-served by recognition

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[10] This Court has considered "the policy decisions of the States" in determining the scope of privileges under federal law. *Jaffee*, 116 S. Ct. at 1929. Many States recognize that the attorney-client privilege applies to government agencies. *See, e.g.*, Cal. Evid. Code § 951 comment (West 1995) ("public entities have a privilege insofar as communications made in the course of the lawyer-client relationship are concerned"). *See generally* 1 Gregory P. Joseph & Stephen A. Saltzberg, *Evidence in America: The Federal Rules in the States*, ch. 24 (1987 & Supp. 1994); Paul R. Rice, *Attorney-Client Privilege: State Law* § 4.28 (1996). Of the States that have adopted Uniform Rule of Evidence 502, most have declined to adopt subsection (d)(6) of that Rule, which restricts somewhat the government's attorney-client privilege. *Id.*

of a governmental attorney-client privilege applicable in criminal proceedings inquiring into the actions of public officials," it is difficult to see how the court could reach a different result for state and local officials.

As a result of the Court of Appeals' decision, a state lawyer who serves as counsel to a Governor (or, for that matter, any other state or municipal lawyer) could find herself having to testify as to otherwise privileged communications as an adverse witness in either a federal criminal or federal grand jury proceeding. Despite the State's own determination that the benefits of the governmental attorney-client privilege outweigh its costs, state and local officials will thus be deterred from seeking legal advice, and their communications with counsel will be constrained. *Cf. Jaffee*, 116 S. Ct. at 1930 ("Denial of the federal [psychotherapist-patient] privilege therefore would frustrate the purposes of the state legislation that was enacted to foster these confidential communications."). This could well result in significant damage to the effective functioning of State governments.

CONCLUSION

For the reasons stated in this brief and in the Petition, the Petition for a Writ of Certiorari should be granted.

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